By Mr. SPERRY: Petition of citizens of New Haven, Conn., against conditions in the Kongo Free State—to the Committee on Foreign Affairs.

Also, petition of New Haven Typographical Union, No. 47, for the copyright bill with an amendment—to the Committee on Patents.

Also, petition of the Connecticut Editorial Association, against increase of second-class postal rates—to the Committee on the Post-Office and Post-Roads.

Also, petition of Lumber Dealers' Association of Connecticut, for forest reserves in the White Mountains—to the Committee on Agriculture.

Also, petition of Elm City Division, No. 317, Order of Railway Conductors, for the sixteen-hour bill—to the Committee on Interstate and Foreign Commerce.

By Mr. TAWNEY: Paper to accompany bill for relief of Milton Selby—to the Committee on Invalid Pensions.

SENATE.

TUESDAY, *February 12, 1907.*

The Chaplain, Rev. EDWARD E. HALE, delivered the following prayer:

Let us now praise famous men, leaders of the people by their counsels, and by their understanding men of learning for the people.

Without such no city shall be inhabited. His memorial shall not depart and his name shall live from generation to generation.

Nations shall declare his wisdom and the congregations shall show forth his praise.

Let us pray. Be pleased to consecrate to-day to us, Father, its memories, its lessons, its sacrifices for man and for Thee. Not in vain that he lived for us, not in vain that he died for us if we can follow in his footsteps, if we can carry out his purpose, if we are willing to live and die for our country—with charity toward all, with malice to none. Show us each and all how we can bear our brothers' burdens. Show us how to forget ourselves and to live for others, how State can help State and nation can help nation, that this may be Thy world, one world of the living God, alive with Thy life and strong with Thy strength.

Father, we turn back to the memory of such a life as this, and not backward only. We look forward for this country, that it may be that happy nation whose God is in the Lord; that the children of this country may know what it is that they have a country to live in, and that for that country they may be willing to live and die. We ask it in Christ Jesus.

Our Father who art in heaven; hallowed by Thy name. Thy kingdom come. Thy will be done on earth as it is done in heaven. Give us this day our daily bread, and forgive us our trespasses as we forgive those who trespass against us. Lead us not into temptation, but deliver us from evil. For Thine is the kingdom, and the power, and the glory forever and ever. Amen.

The Secretary proceeded to read the Journal of yesterday's proceedings, when, on request of Mr. GALLINGER, and by unanimous consent, the further reading was dispensed with.

The VICE-PRESIDENT. The Journal stands approved.

RULES AND REGULATIONS OF DEPARTMENT OF AGRICULTURE.

The VICE-PRESIDENT laid before the Senate a communication from the Secretary of Agriculture, transmitting, in response to a resolution of the 1st instant, a copy of all the rules and regulations governing the Department of Agriculture in its various branches; which, with the accompanying papers, was ordered to lie on the table.

RAILROAD STATISTICS.

The VICE-PRESIDENT laid before the Senate a communication from the Interstate Commerce Commission, transmitting, in response to a resolution of the 8th instant, various original papers, documents, and figures prepared by Messrs. Hanks and Harriman, referred to in the answer of the Interstate Commerce Commission, as shown in Senate Document No. 285, Fifty-ninth Congress, second session.

Mr. CULBERSON. If the communication is not lengthy, I would be glad to have it read.

The communication was read, as follows:

INTERSTATE COMMERCE COMMISSION,
Washington, February 11, 1907.

To the President of the Senate.

SIR: The Interstate Commerce Commission has the honor to submit the following response to the resolution of the Senate adopted February 8, 1907, which directs the Commission:

"To send to the Senate copies of the 'various papers, documents, and figures' which were prepared by Messrs. Hanks and Harriman, and which are referred to in the answer of the Interstate Commerce Commission to Senate resolution shown in Senate Document No. 285, this session."

The material above referred to is described by the following list of exhibits, which was made out by Mr. Harriman at the time the papers in question were turned over to the Commission:

Exhibit 1. General balance sheet. Standard arranged according to gross earnings per mile.
Exhibit 2. General balance sheet. Treating all railroads as put in one system.
Exhibit 3. Leased roads.
Exhibit 4. Financial classification general balance sheet.
Exhibit 5. Alphabetical list of operating railways. General information.
Exhibit 6. Classification of kind of railroad.
Exhibit 7. Tentative scheme for permanent numbering of railroads.
Exhibit 8. List of operating railroads arranged according to gross earnings per mile.
Exhibit 9. List of narrow-gauge roads.
Exhibit 10. Card index. List of operating roads arranged according to gross earnings from operations per mile for the year 1906.
Exhibit 11. 1905 operating roads arranged alphabetically.
Exhibit 12. Card index. List of time-card information.
Exhibit 13. Card index. List of time-card information.
Exhibit 14. Card index. List of time-card information.
Exhibit 15. Summary of the correspondence relative to switching and terminal companies.
Exhibit 16. Time tables received by result of correspondence.
Exhibit 17. Letter file. Replies of switching and terminal companies.
Exhibit 18. Letter file. Reply to time-card circular.
Exhibits 19 and 20. Alphabetical card index of railroads from various sources.
Exhibit 21. Maps. Location of switching and terminal companies as disclosed by correspondence.
Exhibit 22. Card index. Terminal and switching companies.

In order that the Senate may be promptly furnished with the information called for by the resolution the original papers, documents, and figures turned over to the Commission by Messrs. Hanks and Harriman are herewith transmitted, as it would be impossible with our present clerical force to prepare copies during the present session of Congress.

All of which is respectfully submitted.

MARTIN A. KNAPP, *Chairman.*

Mr. CULBERSON. I move the communication and exhibits be referred to the Committee on Interstate Commerce.

The motion was agreed to.

REPORT OF NATIONAL ACADEMY OF SCIENCES.

The VICE-PRESIDENT laid before the Senate the annual report of the National Academy of Sciences for the year 1906; which was ordered to be printed.

COMMITTEE SERVICE.

Mr. LONG was, on his own motion, excused from further service upon the Committee on Indian Affairs.

Mr. HALE submitted the following resolution; which was considered by unanimous consent, and agreed to:

Resolved, That Mr. SMITH be appointed to fill the vacancy in the chairmanship of the Committee on the Examination and Disposition of Documents.

Mr. HALE submitted the following resolution; which was considered by unanimous consent, and agreed to:

Resolved, That Mr. HOPKINS be appointed to fill the vacancy in the Committee on Enrolled Bills.

Mr. HALE submitted the following resolution; which was considered by unanimous consent, and agreed to:

Resolved, That Mr. BEVERIDGE be appointed to fill the vacancy in the Committee on the Examination and Disposition of Documents.

Mr. HALE submitted the following resolution; which was considered by unanimous consent, and agreed to:

Resolved, That Mr. CURTIS be appointed to fill the vacancy in the Committee on Indian Affairs.

Mr. HALE submitted the following resolution; which was considered by unanimous consent, and agreed to:

Resolved, That Mr. FULTON be appointed to fill the vacancy in the Committee on Military Affairs.

MESSAGE FROM THE HOUSE.

A message from the House of Representatives, by Mr. W. J. BROWNING, its Chief Clerk, announced that the House had passed the following bills:

S. 3668. An act to authorize the Washington, Spa Spring and Gretta Railroad Company, of Prince George County, to extend its street railway into the District of Columbia; and

S. 8065. An act to provide for the transfer to the State of South Carolina of certain school funds for the use of free schools in the parishes of St. Helena and St. Luke, in said State.

The message also announced that the House had passed the following bills; in which it requested the concurrence of the Senate:

H. R. 20067. An act to remove dirt, gravel, sand, and other obstructions from the paved sidewalks and alleys in the District of Columbia, and for other purposes;

H. R. 21934. An act to provide for reports and registration of all cases of tuberculosis in the District of Columbia, for free examination of sputum in suspected cases, and for preventing the spread of tuberculosis in said District;

H. R. 23576. An act to provide for the extension of New Hampshire avenue, in the District of Columbia, and for other purposes;

H. R. 24284. An act for the opening of Warren and Forty-sixth streets NW., in the District of Columbia;

H. R. 24875. An act authorizing the extension of Forty-fifth street NW.;

H. R. 24930. An act prohibiting the distribution of circulars and certain other advertising matter on private property within the District of Columbia, and for other purposes;

H. R. 25475. An act to amend an act entitled "An act to regulate the practice of pharmacy and the sale of poisons in the District of Columbia, and for other purposes," approved May 7, 1906; and

H. R. 25482. An act to amend section 878 of the Code of Law for the District of Columbia.

ENROLLED BILLS SIGNED.

The message further announced that the Speaker of the House had signed the following enrolled bills; and they were thereupon signed by the Vice-President:

S. 6833. An act granting an increase of pension to Bettie May Vose;

H. R. 8685. An act for the relief of Charles E. Danner & Co.;

H. R. 24109. An act to authorize the Norfolk and Western Railway Company to construct sundry bridges across the Tug Fork of the Big Sandy River; and

H. R. 25123. An act providing for the construction of a bridge across the Mississippi River.

PETITIONS AND MEMORIALS.

The VICE-PRESIDENT presented a memorial of the Study Class of the Abraham Lincoln Center, of Chicago, Ill., remonstrating against any appropriation being made for the proposed military display at the Jamestown Exposition; which was referred to the Select Committee on Industrial Expositions.

He also presented a memorial of the Commercial Club of Lafayette, Ind., remonstrating against the enactment of legislation curtailing the mail service; which was referred to the Committee on Post-Offices and Post-Roads.

Mr. FRYE presented a memorial of the War Veterans and Sons' Association, remonstrating against the enactment of legislation abolishing the pension agencies throughout the country; which was referred to the Committee on Pensions.

He also presented petitions of sundry citizens of Searsmont, South Durham, Island Falls, and Parkman, all in the State of Maine, praying for the enactment of legislation to regulate the interstate transportation of intoxicating liquors; which were referred to the Committee on the Judiciary.

Mr. HANSBROUGH presented a petition of sundry citizens of Stillwell, N. Dak., and a petition of sundry citizens of North Dakota, praying for the adoption of certain amendments to the present denatured-alcohol bill; which were referred to the Committee on Finance.

He also presented a petition of sundry citizens of Pembina, N. Dak., praying for the enactment of legislation to regulate the interstate transportation of intoxicating liquors; which was referred to the Committee on the Judiciary.

Mr. CULLOM. I present resolutions adopted by a convention of the National Association of Postmasters, held in St. Louis, Mo., October 3, 4, 5, 1906. The resolutions are not very long, and as they set forth the reason for the reclassification and greater compensation of post-office clerks, I ask that they be printed in the RECORD, and referred to the Committee on Post-Offices and Post-Roads.

There being no objection, the resolutions were referred to the Committee on Post-Offices and Post-Roads, and ordered to be printed in the RECORD, as follows:

Resolutions indorsing reclassification and greater compensation for post-office clerks.—Adopted by convention of the National Association of Postmasters, held in St. Louis, Mo., October 3, 4, and 5, 1906.

Whereas the subject of a new classification of post-office clerks and an increase of pay for them having been carefully and fully considered by the convention of first-class postmasters, held in St. Louis, Mo., October 3, 4, 5, 1906, and it being established beyond a question that because of the era of great prosperity and great demand in all walks of life for competent and intelligent men in every branch of service, trade, or traffic, wages for skilled labor having increased materially, the cost of living in all the cities where large post-offices are maintained also greatly increased; and

Whereas the records of the Post-Office Department show no increase in some clerks' salaries for many years past, and now show an astonishing and alarming number of resignations of these Government employees during the past year or two, greatly in excess of any previous years, giving ample proof that in order to obtain good, efficient, and competent clerks in the service that some better inducement must be held out to them in the matter of pay and classification, otherwise the postal service will be still further seriously crippled, to the great damage of the business interests of this country: Now, therefore, be it

Resolved, That it is the sense of this convention that a committee of nine postmasters of the first class be appointed by the president of this association, who, by and with the consent of the President of the United States and the Postmaster-General, will appear before the Congressional Committee on Post-Offices and Post-Roads, as soon as practicable, and present to said committee our most urgent request that for the good of the service they take immediate necessary action of a reclassification and a material increase in salaries of post-office clerks: Be it

Further resolved, That in order that this committee shall be prepared to properly present the question to the said Congressional Committee on Post-Offices and Post-Roads, it is hereby requested that every first-class postmaster in the United States immediately prepare a statement giving number of separations from the service in their respective post-offices and the reason for same during the past fiscal year, July 1, 1905, to June 30, 1906, and forward same to the chairman of this committee as soon as possible.

I, Addie Vester, secretary of the National Association of Postmasters, do hereby certify that the above and foregoing is a true and correct copy from the records of the above and foregoing resolution, and in witness whereof I have hereunto set my hand as said secretary at the city of St. Louis, Mo., this 5th day of October, 1906.

ADDIE VESTER, *Secretary*.

Mr. PLATT presented a memorial of the American Musical Copyright League, of New York City, N. Y., remonstrating against the passage of the so-called "Kittredge copyright bill;" which was ordered to lie on the table.

He also presented a petition of the congregation of the First Presbyterian Church of Lyons, N. Y., praying for the enactment of legislation to regulate the employment of child labor; which was ordered to lie on the table.

He also presented a petition of the Clearing House Association of Cleveland, Ohio, praying for the adoption of certain amendments to the present national banking law; which was referred to the Committee on Finance.

He also presented a memorial of the county board of directors of the Ancient Order of Hibernians of Erie County, N. Y., remonstrating against the enactment of legislation to further restrict immigration; which was referred to the Committee on Immigration.

He also presented a petition of the United Master Butchers' Association, of Troy, N. Y., praying for the enactment of legislation requiring meat markets in the District of Columbia to be closed on Sunday; which was referred to the Committee on the District of Columbia.

He also presented a petition of the congregation of the Baptist Church of Fredonia, N. Y., and a petition of sundry citizens of Rush, N. Y., praying for the enactment of legislation to regulate the interstate transportation of intoxicating liquors; which were referred to the Committee on the Judiciary.

He also presented petitions of sundry business firms of Jamestown, Newburgh, and Falconer, all in the State of New York, praying for the adoption of certain amendments to the present denatured-alcohol law; which were referred to the Committee on Finance.

Mr. DEPEW presented petitions of sundry citizens of Ellicottville, Pleasantville, Porter, Hermon, Groton, Burke, Ceres, Rose, Millville, Bridgeport, New York, Port Byron, and Northville, all in the State of New York, praying for the enactment of legislation to regulate the interstate transportation of intoxicating liquors; which were referred to the Committee on the Judiciary.

Mr. McCUMBER presented a petition of sundry citizens of Pembina, N. Dak., praying for the enactment of legislation to regulate the interstate transportation of intoxicating liquors; which was referred to the Committee on the Judiciary.

Mr. HEMENWAY presented a petition of the Spiegel Furniture Company, of Shelbyville, Ind., praying for the adoption of certain amendments to the present denatured-alcohol bill; which was referred to the Committee on Finance.

He also presented the petition of George H. Caldwell, of Indiana, praying for the enactment of legislation for the relief of Joseph V. Cunningham and other officers of the Philippine volunteers; which was referred to the Committee on Claims.

Mr. CRANE presented a petition of the National Board of Trade, of Washington, D. C., praying for the ratification of international reciprocity treaties; which was referred to the Committee on Foreign Relations.

He also presented a petition of the National Board of Trade, of Washington, D. C., praying for the enactment of legislation providing for an elastic national currency; which was referred to the Committee on Finance.

Mr. GAMBLE. I present a joint resolution of the legislature of South Dakota, which I ask may be printed in the RECORD, and referred to the Committee on Interstate Commerce.

The memorial was referred to the Committee on Interstate Commerce, and ordered to be printed in the RECORD, as follows:

STATE OF SOUTH DAKOTA, DEPARTMENT OF STATE,
SECRETARY'S OFFICE.

UNITED STATES OF AMERICA, STATE OF SOUTH DAKOTA.

I, D. D. Wipf, secretary of state of South Dakota, and keeper of the great seal thereof, do hereby certify that the attached instrument of

writing is a true and correct copy of senate joint resolution No. 12, as passed by the tenth legislative assembly of the State of South Dakota, now in session, and of the whole thereof, and has been compared with the original now on file in this office.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of South Dakota, done at the city of Pierre this 8th day of February, 1907.

[SEAL.]

D. D. WIPF,
Secretary of State.

A JOINT RESOLUTION.

Whereas there was reported in the House of Representatives of the United States (S. 5133) upon January 11, 1907, an act passed by the Senate of the United States entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon;" and

Whereas the interests of travelers upon railroads of the United States and of the employees thereon demand the speedy enactment into law of this measure: Therefore, be it

Resolved by the senate and house of representatives of the State of South Dakota, That the Representatives in Congress from the State of South Dakota be requested to use their votes and influence to secure an immediate favorable report upon and the passage of said act (S. 5133) entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon;" be it

Further resolved, That one copy of this resolution be sent to the Speaker of the House of Representatives of the United States, one copy to the chairman of the Committee on Interstate and Foreign Commerce of said House, and to each Member of Congress from the State of South Dakota.

[Indorsed.]

A joint resolution requesting the Representatives in Congress from the State of South Dakota to use their votes and influence to secure an immediate favorable report upon and passage of an act (S. 5133) entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon."

M. J. CHANEY,
Speaker of the House.

Attest:
JAMES W. CONE,
Chief Clerk.

HOWARD G. SHOBER,
President of the Senate.

Attest:
L. M. SIMONS,
Secretary of the Senate.

I hereby certify that the within resolution originated in the senate and was known in the senate files as "S. J. resolution No. 12."

L. M. SIMONS, *Secretary.*

STATE OF SOUTH DAKOTA, OFFICE OF THE SECRETARY OF STATE, *ss:*

Filed February 8, 1907, at 3.15 o'clock p. m.

D. D. WIPF,
Secretary of State.

Mr. STONE presented petitions of sundry citizens of Green City and Caruthersville, in the State of Missouri, praying for the enactment of legislation to regulate the employment of child labor; which were ordered to lie on the table.

He also presented a petition of sundry citizens of Caruthersville, Mo., praying for the enactment of legislation to regulate the interstate transportation of intoxicating liquors; which was referred to the Committee on the Judiciary.

He also presented a petition of the Affiliated Business Men's Associations of St. Louis Mo., praying for the enactment of legislation providing increased appropriations for the improvement of the Mississippi River from St. Louis to Cairo; which was referred to the Committee on Commerce.

He also presented petitions of sundry citizens of Joplin and Webb City, in the State of Missouri, remonstrating against the enactment of legislation requiring certain places of business in the District of Columbia to be closed on Sunday; which were referred to the Committee on the District of Columbia.

He also presented a memorial of the Kansas City Section, Council of Jewish Women, of Kansas City, and of Kansas City Lodge, Independent Order of B'nai B'rith, of Kansas City, in the State of Missouri, remonstrating against the adoption of certain amendments to the immigration law; which were referred to the Committee on Immigration.

He also presented a petition of sundry citizens of Caruthersville, Mo., praying for the enactment of legislation to regulate the manufacture and sale of patent and proprietary medicines; which was referred to the Committee on Manufactures.

He also presented a petition of St. Louis Typographical Union, No. 8, of St. Louis, Mo., praying for the enactment of legislation to amend and consolidate the acts respecting copyrights; which was ordered to lie on the table.

Mr. GALLINGER presented a petition of Branch No. 4, National League of Navy-yard Workmen, of Portsmouth, N. H., praying for the passage of the so-called anti-injunction and half-holiday bills; which was referred to the Committee on the Judiciary.

He also presented a petition of the New Century Club, of Philadelphia, Pa., praying that an appropriation be made for a scientific investigation into the industrial condition of woman and child workers in the United States; which was ordered to lie on the table.

He also presented a petition of the National Board of Trade of Washington, D. C., praying for the enactment of legislation to regulate the issue of receipts for warehoused produce and merchandise; which was referred to the Committee on Finance.

Mr. ALLISON presented memorials of sundry citizens of Sioux Rapids, Taylor County, Montgomery County, Clarke County, Buchanan County, Marshall County, Scott County, Prairie City, Mills County, Lee County, Story City, Sheldon, Osceola County, Pottawattamie County, Comanche, Atalissa, Atlantic, Millersburg, O'Brien County, Clinton County, Adel, Davis County, Storm Lake, and Davis City, all in the State of Iowa, remonstrating against the enactment of legislation requiring certain places of business in the District of Columbia to be closed on Sunday; which were referred to the Committee on the District of Columbia.

He also presented petitions of sundry citizens of Drakeville, Dubuque, Smyrna, Bristow, Danville, Marshalltown, and Louisa County, all in the State of Iowa, praying for the enactment of legislation to regulate the interstate transportation of intoxicating liquors; which were referred to the Committee on the Judiciary.

He also presented a petition of the National Association of Retail Druggists, of Chicago, Ill., praying for a legal construction of the present antitrust laws; which was referred to the Committee on the Judiciary.

He also presented the petition of Rev. J. H. Benedict, of Iowa City, Iowa, praying for the enactment of legislation to prohibit the sale of intoxicating liquors in all Government buildings, grounds, and ships, and also for the enactment of legislation to regulate the interstate transportation of intoxicating liquors; which was referred to the Committee on Public Buildings and Grounds.

He also presented a memorial of the Corn Belt Meat Producers' Association, of Des Moines, Iowa, remonstrating against the repeal of the present meat-inspection law; which was ordered to lie on the table.

He also presented a petition of the Negro Republican Club of Polk County, Iowa, praying for an investigation into the dismissal of three companies of the Twenty-fifth Infantry; which was referred to the Committee on Military Affairs.

He also presented a petition of the Iowa State Retail Merchants' Association, of Des Moines, Iowa, praying for the enactment of legislation to repeal the present bankruptcy law; which was referred to the Committee on the Judiciary.

He also presented a petition of the Farmers' Grain Dealers' Association, of Fort Dodge, Iowa, praying for the enactment of legislation providing for a national reciprocal demurrage law penalizing railroads for neglecting to perform their duty as common carriers of freight; which was referred to the Committee on Interstate Commerce.

Mr. NELSON presented a petition of sundry citizens of Watson, Minn., praying for the adoption of certain amendments to the present denatured-alcohol law; which was referred to the Committee on Finance.

He also presented a petition of sundry citizens of Stillwater, Minn., praying for the ratification of international arbitration treaties; which was referred to the Committee on Foreign Relations.

Mr. PILES presented a petition of sundry citizens of Washington, praying for the enactment of legislation to regulate the interstate transportation of intoxicating liquors; which was referred to the Committee on the Judiciary.

Mr. OVERMAN presented sundry papers to accompany the bill (S. 8224) granting an increase of pension to Charles Gunter; which were referred to the Committee on Pensions.

He also presented sundry papers to accompany the bill (S. 8227) granting an increase of pension to John H. Johnson; which were referred to the Committee on Pensions.

Mr. PENROSE presented a memorial of the National Board of Trade of Washington, D. C., remonstrating against the ownership of railways by the United States Government; which was referred to the Committee on Railroads.

He also presented a petition of the National Board of Trade of Washington, D. C., praying for the passage of the so-called "Southern Appalachian and White Mountain Forest Reserve bill;" which was ordered to lie on the table.

He also presented a petition of the National Board of Trade of Washington, D. C., praying for the enactment of legislation to confer upon the administrative branch of the Government additional authority in arranging treaties with foreign nations; which was referred to the Committee on Foreign Relations.

He also presented a petition of the National Board of Trade of Washington, D. C., praying for the enactment of legislation providing for a reduction of letter postage to 1 cent per ounce; which was referred to the Committee on Post-Offices and Post-Roads.

He also presented a petition of the National Board of Trade of Washington, D. C., praying that an appropriation be made for the improvement of the rivers, harbors, and waterways of the country; which was referred to the Committee on Commerce.

Mr. DANIEL presented memorials of sundry business firms of Richmond and Danville and of the Board of Trade of Richmond, all in the State of Virginia, remonstrating against the passage of the so-called "free leaf-tobacco bill;" which were referred to the Committee on Finance.

Mr. HOPKINS presented a petition of the Trades and Labor Assembly of Quincy, Ill., praying for the enactment of legislation to regulate the employment of child labor; which was ordered to lie on the table.

He also presented a memorial of sundry citizens of Galesburg, Ill., remonstrating against the enactment of legislation requiring certain places of business in the District of Columbia to be closed on Sunday; which was referred to the Committee on the District of Columbia.

He also presented a memorial of the Will County Farmers' Institute, of Joliet, Ill., remonstrating against the passage of the so-called "ship-subsidy bill;" which was ordered to lie on the table.

He also presented a petition of the Will County Farmers' Institute, of Joliet, Ill., praying that an appropriation be made for the construction of a deep waterway from the Great Lakes to the Gulf of Mexico; which was referred to the Committee on Commerce.

He also presented a petition of the Woman's Christian Temperance Union of Elgin, Ill., praying for the enactment of legislation to regulate the interstate transportation of intoxicating liquors; which was referred to the Committee on the Judiciary.

Mr. BLACKBURN presented a petition of sundry citizens of Columbus, Ky., praying for the enactment of legislation to regulate the interstate transportation of intoxicating liquors; which was referred to the Committee on the Judiciary.

SAMANA BAY COMPANY.

Mr. McCUMBER. I present a petition of the Samana Bay Company, of Santo Domingo, relative to their claim against the Government of the Dominican Republic. I move that the petition be printed as a document and referred to the Committee on Foreign Relations.

The motion was agreed to.

REPORTS OF COMMITTEES.

Mr. McCUMBER, from the Committee on Pensions, to whom was referred the bill (S. 6277) granting an increase of pension to Marie J. Blaisdell, reported it with amendments, and submitted a report thereon.

Mr. SCOTT, from the Committee on Pensions, to whom was referred the bill (H. R. 17266) granting an increase of pension to Henry W. Alspach, reported it without amendment, and submitted a report thereon.

Mr. ALDRICH. I am directed by the Committee on Finance, to whom was referred the bill (H. R. 13566) to amend sections 6 and 12 of the currency act, approved March 14, 1900, to report it with amendments.

I desire to give notice that I shall try to call up the bill tomorrow morning with a view to its early passage.

The VICE-PRESIDENT. The bill will be placed on the Calendar.

Mr. PILES, from the Committee on Territories, to whom was referred the bill (H. R. 18891) to aid in the construction of a railroad and telegraph and telephone line in the district of Alaska, reported it with amendments, and submitted a report thereon.

CERTIFICATES OF LICENSES.

Mr. FRYE. I am directed by the Committee on Commerce, to whom was referred the bill (H. R. 21204) to amend section 4446 of the Revised Statutes, relating to licensed masters, mates, engineers, and pilots, to report it favorably without amendment. It is a very short bill, and I ask for its present consideration.

The Secretary read the bill; and there being no objection, the Senate as in Committee of the Whole, proceeded to its consideration. It proposes to amend section 4446 of the Revised Statutes so as to read as follows:

SEC. 4446. Every master, mate, engineer, and pilot who shall receive a license shall, when employed upon any vessel, within forty-eight hours after going on duty, place his certificate of license, which shall be framed under glass, in some conspicuous place in such vessel, where it can be seen by passengers and others at all times: *Provided*, That in case of emergency such officer may be transferred to another vessel of the same owners for a period not exceeding forty-eight hours without the transfer of his license to such other vessel; and for every neglect to comply with this provision by any such master, mate, engineer, or pilot, he shall be subject to a fine of $100, or to the revocation of his license.

The bill was reported to the Senate without amendment, ordered to a third reading, read the third time, and passed.

LIGHT-SHIP ON LAKE MICHIGAN.

Mr. FRYE. I am directed by the Committee on Commerce, to whom was referred the bill (S. 8252) to construct and place a light-ship at the easterly end of the southeast shoal near North Manitou Island, Lake Michigan, to report it favorably without amendment, and I submit a report thereon.

Mr. BURROWS. I ask unanimous consent for the present consideration of the bill just reported by the chairman of the Committee on Commerce.

The Secretary read the bill; and there being no objection, the Senate, as in Committee of the Whole, proceeded to its consideration. It directs the Secretary of Commerce and Labor to have constructed and placed at the easterly end of the southeast shoal near North Manitou Island, Lake Michigan, a light-ship, at a cost not to exceed $50,000.

The bill was reported to the Senate without amendment, ordered to be engrossed for a third reading, read the third time, and passed.

HEARINGS ON RIVER AND HARBOR BILL.

Mr. FRYE. Mr. President, I gave notice on Saturday that the Committee on Commerce would hear Senators on Monday morning, Tuesday morning, and Wednesday morning. There is only one other morning left, and I call the attention of Senators to the fact that hearings will be closed to-morrow. The committee meets every afterooon from 2 o'clock, and will be glad to see any Senators who desire to be heard on amendments they have offered.

CANCELLATION OF INDIAN ALLOTMENTS.

Mr. CLAPP. I am directed by the Committee on Indian Affairs, to whom was recommitted the bill (S. 8365) authorizing the Secretary of the Interior to cancel certain Indian allotments and substitute therefor smaller allotments of irrigable land, and providing for compensatory payments to the irrigation fund on lands so allotted within the Truckee-Carson irrigation project, to report it favorably with amendments, and I submit a report thereon.

Mr. NEWLANDS. I ask unanimous consent for the consideration of the bill just reported by the Committee on Indian Affairs.

The Secretary read the bill; and there being no objection, the Senate, as in Committee of the Whole, proceeded to its consideration.

The amendments of the Committee on Indian Affairs were, on page 2, line 1, to strike out the words "general allotment act" before the words "the Secretary of the Interior" and to insert "act of Congress approved February 8, 1887, and the acts amendatory thereto;" and in line 2, after the word "authorized," to insert "with the consent of the allottees;" so as to read:

That in carrying out any irrigation project which may be undertaken under the provisions of the act of June 17, 1902 (32 Stat. L., 388), known as the "reclamation act," and which may make possible and provide for, in connection with the reclamation of other lands, the irrigation of all or any part of the irrigable lands heretofore included in allotments made to Indians under the fourth section of the act of Congress approved February 8, 1887, and the acts amendatory thereto, the Secretary of the Interior is hereby authorized, with the consent of the allottees, to cancel all such allotments, including any trust patent which may have issued therefor, and in lieu thereof to reserve for and allot to each Indian having an allotment of such irrigable land and legally entitled to the same 10 acres of irrigable land, which shall be exempt from the payment of any charges by the allottee assessed under the act of June 17, 1902 (32 Stat. L., 389), but such expense shall be borne by the United States: *Provided*, That any of the lands which may have been included in the canceled allotments and which are not needed or reserved for allotment in smaller areas shall be restored to the public domain, to be disposed of subject to the provisions of the above-mentioned reclamation act.

The amendments were agreed to.

The bill was reported to the Senate as amended, and the amendments were concurred in.

The bill was ordered to be engrossed for a third reading, read the third time, and passed.

BILLS INTRODUCED.

Mr. CULLOM introduced a bill (S. 8432) to provide for the classification of the salaries of clerks employed in post-offices of the first and second classes; which was read twice by its title, and referred to the Committee on Post-Offices and Post-Roads.

Mr. FOSTER introduced the following bills; which were severally read twice by their titles, and referred to the Committee on Claims:

A bill (S. 8433) for the relief of the heirs of Daniel Goos, deceased; and

A bill (S. 8434) for the relief of the heirs of Laura Delahousaye.

Mr. PATTERSON introduced a bill (S. 8435) granting to the city of Durango, in the State of Colorado, certain lands therein described for water reservoirs; which was read twice by its title, and referred to the Committee on Public Lands.

Mr. PATTERSON. I introduce a bill and ask that it lie on the table. I may offer some remarks upon it later in the session.

The bill (S. 8436) to provide for the acquisition, purchase, construction, and condemnation by the United States of America of railroads in the several States and Territories of the United States and the District of Columbia engaged in interstate commerce and in carrying the mails, and to provide for the operation of said roads by the United States, was read twice by its title.

The VICE-PRESIDENT. The bill will lie on the table at the request of the Senator from Colorado.

Mr. PENROSE introduced a bill (S. 8437) granting an increase of pension to J. De Puy Davis; which was read twice by its title, and referred to the Committee on Pensions.

He also introduced a bill (S. 8438) granting an increase of pension to John D. Harris; which was read twice by its title, and referred to the Committee on Pensions.

He also introduced a bill (S. 8439) to correct the military record of John Webster; which was read twice by its title, and, with the accompanying paper, referred to the Committee on Military Affairs.

He also introduced a bill (S. 8440) to authorize the payment of $2,000 to the widow of the late Tranquilino Luna, in full for his contest expenses in the contested-election case of Manzanares against Luna; which was read twice by its title, and referred to the Committee on Claims.

Mr. DEPEW introduced a bill (S. 8441) granting an increase of pension to Charles C. Gage; which was read twice by its title, and referred to the Committee on Pensions.

Mr. GALLINGER introduced a bill (S. 8442) to amend an act entitled "An act to amend section 1 of an act entitled 'An act relating to the Metropolitan police of the District of Columbia,' approved February 28, 1901," approved June 8, 1906; which was read twice by its title, and referred to the Committee on the District of Columbia.

He also introduced a bill (S. 8443) granting a pension to Fanny M. Grant; which was read twice by its title, and referred to the Committee on Pensions.

Mr. OVERMAN introduced a bill (S. 8444) granting an increase of pension to Zephaniah Sams; which was read twice by its title, and, with the accompanying papers, referred to the Committee on Pensions.

Mr. CRANE introduced a bill (S. 8445) to promote the efficiency of the militia, and for other purposes; which was read twice by its title, and referred to the Committee on Military Affairs.

Mr. GAMBLE introduced a bill (S. 8446) to extend the time for the completion of a bridge across the Missouri River at Yankton, S. Dak., by the Yankton, Norfolk and Southern Railway Company; which was read twice by its title, and referred to the Committee on Commerce.

Mr. PERKINS introduced a bill (S. 8447) for the relief of the estate of Joaquin Gomez, or the estate of Vicente P. Gomez, both late of Monterey County, Cal.; which was read twice by its title, and referred to the Committee on Claims.

Mr. DUBOIS introduced the following bills; which were severally read twice by their titles, and referred to the Committee on Territories:

A bill (S. 8448) ratifying an act of the Arizona legislature providing for the erection of a court-house at St. Johns, in Apache County, Ariz.;

A bill (S. 8449) ratifying chapters 57 and 61 of the session laws of the twenty-third Arizona legislative assembly, providing for the issuance of bonds by Mohave County to erect court-house and jail in said county;

A bill (S. 8450) to enable the city of Phoenix, in Maricopa County, Ariz., to use the proceeds of certain municipal bonds for the purchase of the plant of the Phoenix Water Company and to extend and improve said plant; and

A bill (S. 8451) ratifying and confirming chapter 58 of the twenty-third legislative assembly of the Territory of Arizona, providing for repair of the Territorial bridge at Florence, Pinal County, Ariz.

Mr. DUBOIS introduced the following bills; which were severally read twice by their titles, and referred to the Committee on Indian Affairs:

A bill (S. 8452) to compensate the members of the Eastern Cherokee council and executive committee for expenses incurred and services rendered in administering the affairs of the said Eastern Cherokees;

A bill (S. 8453) to extend the period during which persons heretofore identified as Mississippi Choctaws may remove to the Choctaw-Chickasaw country; and

A bill (S. 8454) to provide for the survey and sale of a certain island in Grand River, Cherokee Nation, heretofore unsurveyed.

Mr. HOPKINS introduced a bill (S. 8455) granting an increase of pension to John A. Garrisine; which was read twice by its title, and referred to the Committee on Pensions.

Mr. PILES (for Mr. WARNER) introduced a bill (S. 8456) granting an increase of pension to Margaret Baber; which was read twice by its title, and referred to the Committee on Pensions.

AMENDMENTS TO APPROPRIATION BILLS.

Mr. SCOTT submitted an amendment intended to be proposed by him to the river and harbor appropriation bill; which was referred to the Committee on Commerce, and ordered to be printed.

Mr. PLATT submitted an amendment relative to certain drafts heretofore issued in payment of refunding internal-revenue taxes illegally collected, etc., intended to be proposed by him to the general deficiency appropriation bill; which was referred to the Committee on Finance, and ordered to be printed.

He also submitted an amendment intended to be proposed by him to the river and harbor appropriation bill; which was referred to the Committee on Commerce, and ordered to be printed.

Mr. DEPEW submitted an amendment intended to be proposed by him to the river and harbor appropriation bill; which was referred to the Committee on Commerce, and ordered to be printed.

Mr. McCUMBER submitted an amendment proposing to appropriate $177.95 to pay the claim of O. Maury & Co., of Bordeaux, France, for damages and storage of three casks of wine, etc., intended to be proposed by him to the agricultural appropriation bill; which was referred to the Committee on Agriculture and Forestry, and ordered to be printed.

Mr. CULBERSON submitted two amendments intended to be proposed by him to the river and harbor appropriation bill; which were referred to the Committee on Commerce, and ordered to be printed.

Mr. PETTUS submitted an amendment intended to be proposed by him to the river and harbor appropriation bill; which was referred to the Committee on Commerce, and ordered to be printed.

AFFAIRS OF MEXICAN KICKAPOO INDIANS.

Mr. CLAPP submitted the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

Resolved, That Senate resolution No. 220, second session Fifty-ninth Congress, be amended and modified so as to read as follows: "The Committee on Indian Affairs is hereby authorized and directed, by subcommittee or otherwise, to take and have printed testimony for the purpose of ascertaining all the facts with reference to the affairs of the Mexican Kickapoo Indians. Said committee is authorized to send for persons and papers, to administer oaths, to sit during sessions or recess of the Senate, either at Washington or elsewhere, as may be deemed advisable; the expenses of the investigation to be paid from the contingent fund of the Senate."

Mr. KEAN subsequently said: The resolution offered this morning by the Senator from Minnesota [Mr. CLAPP] is a modification of the existing resolution, and as it will save the Government a great deal of money by adopting it, I desire to report it back favorably from the Committee to Audit and Control the Contingent Expenses of the Senate, and I ask for its passage.

The Senate, by unanimous consent, proceeded to consider the resolution.

Mr. CULBERSON. I recall that in the Indian appropriation bill, or during the discussion of that bill, it was proposed that the Department of Justice should make an inquiry into this matter, and, if necessary, institute proper legal proceedings.

Mr. CLAPP. That amendment was stricken out on a point of order.

Mr. CULBERSON. Very well.

Mr. KEAN. It was stricken out on a point of order, one of the reasons being because the Committee on Indian Affairs is at the present time investigating the matter.

The VICE-PRESIDENT. The question is on agreeing to the resolution.

The resolution was agreed to.

HOUSE BILLS REFERRED.

The following bills were severally read twice by their titles, and referred to the Committee on the District of Columbia:

H. R. 20067. An act to remove dirt, gravel, sand, and other obstructions from the paved sidewalks and alleys in the District of Columbia, and for other purposes;

H. R. 21934. An act to provide for reports and registration of all cases of tuberculosis in the District of Columbia, for the free examination of sputum in suspected cases, and for preventing the spread of tuberculosis in said District;

H. R. 23576. An act to provide for the extension of New Hampshire avenue, in the District of Columbia, and for other purposes;

H. R. 24284. An act for the opening of Warren and Forty-sixth streets NW., in the District of Columbia;

H. R. 24875. An act authorizing the extension of Forty-fifth street NW.;

H. R. 24930. An act prohibiting the distribution of circulars and certain other advertising matter on private property within the District of Columbia, and for other purposes;

H. R. 25475. An act to amend an act entitled "An act to regulate the practice of pharmacy and the sale of poisons in the District of Columbia, and for other purposes," approved May 7, 1906; and

H. R. 25482. An act to amend section 878 of the Code of Law for the District of Columbia.

CERTAIN LAND TITLES IN LOUISIANA.

Mr. FOSTER. I ask unanimous consent for the consideration of the bill (H. R. 15242) to confirm titles to certain lands in the State of Louisiana.

The Secretary read the bill; and there being no objection, the Senate, as in Committee of the Whole, proceeded to its consideration.

The bill was reported to the Senate without amendment, ordered to a third reading, read the third time, and passed.

ALASKA-YUKON-PACIFIC EXPOSITION.

Mr. PILES. I ask for the consideration of the bill (S. 7382) to encourage the holding of an Alaska-Yukon-Pacific Exposition at the city of Seattle, State of Washington, in the year 1909.

The Secretary read the bill.

The VICE-PRESIDENT. Is there objection to the consideration of the bill which has just been read?

Mr. PATTERSON. Is there a report from a committee?

The VICE-PRESIDENT. A report accompanies the bill.

Mr. PATTERSON. I should like to have the report read.

The VICE-PRESIDENT. Without objection, the Secretary will read the report.

The Secretary proceeded to read the report submitted by Mr. WARNER, from the Select Committee on Industrial Expositions, on the 8th instant.

Mr. PATTERSON. I am told that the report is a very long document. Let the bill go over until to-morrow morning.

The VICE-PRESIDENT. Under objection, the bill will lie over.

APPEALS IN CRIMINAL CASES.

Mr. NELSON. In pursuance of the notice I gave last night, I move that the Senate proceed to the consideration of the bill (H. R. 15434) to regulate appeals in criminal prosecutions.

The motion was agreed to.

MARGARET NEUTZE.

Mr. CULBERSON. Mr. President——

The VICE-PRESIDENT. Does the Senator from Minnesota yield to the Senator from Texas?

Mr. NELSON. I had agreed to yield to the Senator from Texas to call up a bill that will not lead to debate.

Mr. CULBERSON. I ask unanimous consent for the present consideration of the bill (H. R. 20169) for the relief of Margaret Neutze, of Leon Springs, Tex.

There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the bill. It directs the Secretary of the Treasury to pay to Margaret Neutze, of Leon Springs, Tex., $100, in full settlement for damages due her by reason of the killing of two horses by the troops of the United States Army while engaged in target practice near Leon Springs, Tex.

The bill was reported to the Senate without amendment, ordered to a third reading, read the third time, and passed.

MESSAGE FROM THE HOUSE.

A message from the House of Representatives, by Mr. C. R. MCKENNEY, its enrolling clerk, announced that the House had disagreed to the amendments of the Senate to the bill (H. R. 23821) making appropriations for fortifications and other works of defense, for the armament thereof, for the procurement of heavy ordnance for trial and service, and for other purposes, asks a conference with the Senate on the disagreeing votes of the two Houses thereon, and had appointed Mr. SMITH of Iowa, Mr. KEIFER, and Mr. FITZGERALD managers at the conference on the part of the House.

The message also announced that the House had disagreed to the amendments of the Senate to the bill (H. R. 25242) to authorize additional aids to navigation in the Light-House Establishment, and for other purposes, asks a conference with the Senate on the disagreeing votes of the two Houses thereon, and had appointed Mr. MANN, Mr. STEVENS of Minnesota, and Mr. ADAMSON managers at the conference on the part of the House.

The message further returned to the Senate, in compliance with its request, the bill (S. 7495) to define the status of certain patents and pending entries, selections, and filings on lands formerly within the Fort Berthold Indian Reservation, in North Dakota.

AIDS TO NAVIGATION.

Mr. FRYE. I ask the Chair to lay before the Senate the bill just returned from the House to authorize additional aids to navigation.

The VICE-PRESIDENT laid before the Senate the action of the House of Representatives disagreeing to the amendments of the Senate to the bill (H. R. 25242) to authorize additional aids to navigation in the Light-House Establishment, and for other purposes, and asking a conference with the Senate on the disagreeing votes of the two Houses thereon.

Mr. FRYE. I move that the Senate insist on its amendments and agree to the conference asked by the House, and that the Chair appoint the conferees on the part of the Senate.

The motion was agreed to; and the Vice-President appointed Mr. ELKINS, Mr. PERKINS, and Mr. MALLORY as the conferees on the part of the Senate.

FORTIFICATIONS APPROPRIATION BILL.

The VICE-PRESIDENT laid before the Senate the action of the House of Representatives disagreeing to the amendments of the Senate to the bill (H. R. 23821) making appropriations for fortifications and other works of defense, for the armament thereof, for the procurement of heavy ordnance for trial and service, and for other purposes, and requesting a conference with the Senate on the disagreeing votes of the two Houses thereon.

Mr. PERKINS. I move that the Senate insist upon its amendments and agree to the conference asked by the House, and that the Chair appoint the conferees on the part of the Senate.

The motion was agreed to; and the Vice-President appointed Mr. PERKINS, Mr. WARREN, and Mr. DANIEL as the conferees on the part of the Senate.

TWIN CITY POWER COMPANY.

Mr. CLAY. Mr. President——

The VICE-PRESIDENT. Does the Senator from Minnesota yield to the Senator from Georgia?

Mr. NELSON. I yield to the Senator from Georgia to call up a local bill if it will not lead to debate.

Mr. CLAY. It can not possibly lead to debate, I will say to the Senator from Minnesota. I ask unanimous consent for the present consideration of the bill (S. 8182) authorizing the Twin City Power Company to build two dams across the Savannah River above the city of Augusta, in the State of Georgia.

There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the bill.

Mr. CLAY. I move to amend the bill in section 3, on page 3, line 8, after the word "unless," by inserting "said work is commenced within one year and;" in line 10, before the word "years," to strike out "five" and insert "three;" and in line 11, after the word "within," to strike out the words "the same time" and insert the words "five years."

The VICE-PRESIDENT. The amendment proposed by the Senator from Georgia will be stated.

The SECRETARY. In section 3, page 3, line 8, after the word "unless," it is proposed to insert "said work is commenced within one year and;" in line 10, before the word "years," to strike out "five" and insert "three;" and in line 11, after the word "within," to strike out "the same time" and to insert "five years;" so as to read:

SEC. 3. That this act shall be null and void unless said work is commenced within one year, and one of the said dams herein authorized shall be completed within three years of the passage of this act, and unless the dams shall be completed within five years the rights and privileges hereby granted shall cease and be determined so far as pertains to the incompleted dam.

The amendment was agreed to.

The bill was reported to the Senate as amended, and the amendment was concurred in.

The bill was ordered to be engrossed for a third reading, read the third time, and passed.

DISTRICT APPROPRIATION BILL.

Mr. GALLINGER. Mr. President, I ask leave at this time to submit a report.

The VICE-PRESIDENT. Does the Senator from Minnesota yield to the Senator from New Hampshire?

Mr. NELSON. Yes; I yield for a report.

Mr. GALLINGER. I am directed by the Committee on Appropriations, to whom was referred the bill (H. R. 24103) making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June 30, 1908, and for other purposes, to report it with amendments, and I submit a report thereon. I give notice that at the earliest possible opportunity I shall ask for the consideration of the bill.

The VICE-PRESIDENT. The bill will be placed on the Calendar.

C. A. BERRY.

Mr. RAYNER obtained the floor.

Mr. ALLISON. Mr. President——

The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Iowa?

Mr. RAYNER. Certainly.

Mr. ALLISON. I ask unanimous consent for the consideration at this time of the bill (H. R. 8365) for the relief of C. A. Berry. It will take but a moment of time.

There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the bill. It proposes to pay to C. A. Berry, of Casey, Iowa, $150, that being the amount paid by C. A. Berry and J. G. Berry for Ruth C. Berry, as shown by cash receipt No. 21616 of the Des Moines (Iowa) land office, the entry under which the payment was made having been canceled, and C. A. Berry being the sole heir and legatee of Ruth C. Berry.

The bill was reported to the Senate without amendment, ordered to a third reading, read the third time, and passed.

HARRY M'L. P. HUSE.

Mr. DICK. I ask the Senator from Maryland to yield to me in order that I may secure the consideration of a bill which will not lead to debate.

Mr. RAYNER. I yield to the Senator.

Mr. DICK. I ask unanimous consent for the immediate consideration of the bill (H. R. 22291) to authorize the reappointment of Harry McL. P. Huse as an officer of the line in the Navy.

There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the bill. It authorizes the President to appoint, by and with the advice and consent of the Senate, Harry McL. P. Huse, now a professor of mathematics in the United States Navy with the rank of commander, a commander on the active list of the Navy, to take rank next after William L. Rodgers; but he shall establish to the satisfaction of the Secretary of the Navy by examination pursuant to law his physical, mental, moral, and professional fitness to perform the duties of that grade, and shall be carried as an additional to the number of the grade to which he may be appointed under this act, or at any time thereafter promoted; and he shall not by the passage of this act be entitled to back pay of any kind.

The bill was reported to the Senate without amendment, ordered to a third reading, read the third time, and passed.

APPEALS IN CRIMINAL PROSECUTIONS.

The Senate, as in Committee of the Whole, resumed the consideration of the bill (H. R. 15434) to regulate appeals in criminal prosecutions.

Mr. RAYNER. I offer the amendment which I send to the desk.

The VICE-PRESIDENT. The amendment submitted by the Senator from Maryland will be stated.

The SECRETARY. On page 2 of the bill, after the amendment inserted after line 20, it is proposed to insert:

Provided, That if upon appeal or writ of error it shall be found that there was error in the rulings of the court during the trial a verdict in favor of the defendant shall not be set aside.

Mr. RAYNER. Mr. President, this bill is a very important bill; I think one of the most important bills we have had before us at this session. It changes the whole criminal practice in one regard in the Federal courts. I am opposed to the bill, but, fearing that it may pass, I have offered the amendment which has been read. I am very frank to say that I would not vote for the bill with the amendment in it, but without the amendment I think it is a perilous undertaking. While I shall only take a very short time in discussing it, I think I can convince almost anybody who will kindly give me his attention that this bill ought not to pass in the shape it is in.

Before I state my objections to the substance of the bill let me give you an objection to the form of the bill, which I do with great deference and respect to the Judiciary Committee. If you look at lines 19 and 20, on page 2, you will find the bill provides:

In all these instances the United States shall be entitled to a bill of exceptions as in civil cases.

Mr. President, there is no bill of exceptions in civil cases in any of these instances at all. I submit to the Senator from Minnesota [Mr. NELSON] in charge of this bill that a bill of exceptions was never heard of in any of the instances he has cited. There is no such thing as a bill of exceptions from a motion quashing an indictment; there is no such thing as a bill of exceptions from a demurrer sustaining an indictment; there is no such thing that I know of, either in the Federal or the State practice, as a bill of exceptions to the overruling of a demurrer to a plea, such as this bill has. My own judgment is that if we intend to pass an important bill of this sort we might as well pass it right.

Mr. BACON. Mr. President——

The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Georgia?

Mr. RAYNER. I do.

Mr. BACON. I am not prepared to say that the Senator's criticism in regard to taking an appeal, from a technical standpoint, is not correct; but I desire to correct one statement he makes, and that is that in no jurisdiction is there allowed a bill of exceptions from a decision upon the various matters specified in the bill now under consideration. In the State which I have the honor in part to represent that is the exact writ upon which an alleged error on such questions is taken from the circuit court up to the supreme court for consideration—a bill of exceptions.

Mr. WHYTE. That is by statute.

Mr. RAYNER. I stated that in no State that I knew of was that the case. Of course you may have a statute of a State that gives you a bill of exceptions, but neither at the common law nor in any State where the common law is in vogue is there any such thing as a bill of exceptions in any of the cases mentioned in this bill. It is by appeal or writ of error. Of course you may have a statute giving you a bill of exceptions. If the court overrules the testimony, you must have a bill of exceptions in order to acquaint the appellate tribunal with the facts that occurred in the court below, because the testimony does not go in the record; but when you are quashing an indictment or sustaining a demurrer, it appears in the record, and an appeal carries up the record, so there is no necessity for a bill of exceptions. That, however, is only a minor point, but I think it ought to be changed, and we ought to say that in all these instances the United States should be entitled to a writ of error or an appeal, if you want to perfect the bill.

I am opposed to the substance of the bill, Mr. President, and I will state briefly why I am opposed to it. I am not particular about the form of my amendment. I am perfectly willing to accept any suggestion that may improve it. The amendment reads in this way:

Provided, That if upon appeal or writ of error it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside.

I have another proposition here, which I have not offered in the shape of an amendment, but which might perhaps be acceptable to me. It carries out the same idea. It reads in this way:

In all these cases the judgment of the inferior court shall not be reversed nor in any manner affected, but the decision of the Supreme Court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may afterwards arise.

Mr. NELSON. Mr. President——

The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Minnesota?

Mr. RAYNER. I do.

Mr. NELSON. Mr. President, I want to call the attention of the Senator from Maryland to the fact that that suggestion of his would make the case simply a moot case, and the Supreme Court would never consider it.

Mr. RAYNER. Well, if by making a case a moot case you mean where a man is found to be not guilty it enables the court to find him guilty, then I am in favor of making a moot case out of it. I am coming to that in a moment.

There is nothing new about the proposed amendment at all. I have copied it from the legislation of several States. I have

no objection, if there is a motion made to quash an indictment upon the ground of the unconstitutionality of the law or a demurrer is filed, that the Supreme Court shall finally determine whether or not that law is constitutional, so as to have some uniformity of decision in the Federal courts; but I will never consent to the case being tried over again if the defendant has been acquitted upon the ground of the unconstitutionality of the law.

The Senator from Minnesota calls it a moot case, but where a man has made a motion to quash an indictment upon the ground that the law is unconstitutional and goes to trial and the court acquits him and it is sought to provide that the Supreme Court can reverse the lower court and have the case tried over again, it is no moot case, so far as the defendant is concerned.

But let me go on and the Senator will understand my point. I have given some examination to this subject; I have had occasion to do so at other times. I want to state this proposition—and I do it again with great deference to the Judiciary Committee and especially to the Senator from Pennsylvania [Mr. KNOX], who I understand proposes to advocate this bill, because I must say there is no member of the American bar whose legal opinion I respect more than I do his opinion—but I want to say that if there is any one phrase in the law upon which there is an irreconcilable conflict of opinion it is upon the question as to what constitutes jeopardy. There is the trouble. If we knew what "jeopardy" meant there would be no trouble about it, because a man can not be put twice in jeopardy, either at common law, under the Constitution, or, I apprehend, under the statutes or constitutions of any of the States.

But what is "jeopardy?" Listen to this a moment. Here is one of the best authorities we have. He has made a summary of the law on this subject. The Senator from Georgia [Mr. BACON], without sustaining them entirely, in the course of his argument read the citations from Abbott. I say, with great deference to Mr. Abbott, that his definition of "jeopardy" is wrong and that the text writers and the authorities have rejected it long ago. Listen to this definition of "jeopardy" and then, Mr. President, see whether it is not necessary to incorporate into this bill just precisely the provision that I have placed in the amendment in order to prevent a man from being tried twice for the same crime. Here is Mr. Abbott's definition:

> A person once placed upon his trial before a competent court and jury, charged with his case upon a valid indictment, is in jeopardy.

I apprehend that no lecturer upon criminal law would venture to tell his class that that is a definition of jeopardy. Let us see how he follows this up:

> When a person is placed on trial upon a valid indictment before a competent court and a jury he is put in jeopardy.

All the time he has to be placed on trial before a competent court and a jury.

Mr. SPOONER. And under a valid indictment.

Mr. RAYNER. And under a valid indictment. Mr. Abbott goes on:

> Whenever a person has been given in charge, on a legal indictment, to a regular jury, and that jury is unnecessarily discharged, he has once been put in jeopardy.

The last quotation I will give is this, because the definition is wrong if the later authorities, in fact, any binding authorities that I know of, are to be taken as decisive of this question:

> Whenever a valid indictment has been returned by a competent grand jury to a court having jurisdiction, the defendant has been arraigned and pleaded, a jury been impaneled and sworn and charged with the case, and all preliminary things of record are ready for the trial, jeopardy has attached.

Mr. President, there is no necessity in the world for having a jury before a man can be put in jeopardy; none whatever. A man can be tried before the court and be put in jeopardy. In my State, for instance, the defendant can select his method of trial. He can be tried before the court, and the State has no choice in the matter. He is in jeopardy. But the authorities have gone way beyond that. A man can be put in jeopardy, as I know the Senator from Wisconsin [Mr. SPOONER] and the Senator from Pennsylvania [Mr. KNOX] will recollect, by being tried before a magistrate. The leading case at common law on this subject was decided by Blackburn and Lush. I have the case here, and I will give it to you in a moment. In that case a prisoner was tried before a magistrate, not on preliminary hearing, but on the merits. He was acquitted, and he was indicted and tried again by the Court of King's Bench. The court unanimously held that he had been put in jeopardy, and that was the end of it. Therefore Abbott's definition is wrong. I only want to show you—and I am anxious to show this to the Senator from Pennsylvania—that there is no accurate definition of "jeopardy."

There is no man can say actually what "jeopardy" means. I understand, Mr. President, that I have not the right to define the word "jeopardy." I am fully aware of that. It is a constitutional provision, and we would not have any right in an act of Congress to define what "jeopardy" is.

Mr. SPOONER. It is a judicial question.

Mr. RAYNER. It is a judicial question, and I would not have any right to define it or limit it or qualify it in any manner.

I have drawn this amendment in such a manner as not to define what "jeopardy" is. I have merely used this phrase, and I have taken it from other statutes, as I will show. I have said that a defendant shall not be tried again, call it "jeopardy" or not. I put myself on the basis that when a man is once tried and once acquitted, no matter what an appellate tribunal may do—it may settle the question for the future and for all pending cases, but the defendant ought not to be tried again.

Let me show that I am right about the conflict of cases. I have read from Abbott. Let us look at what Mr. Bishop says on this subject—and I only intend to quote a few authorities. He experiences the trouble of trying to define what "jeopardy" is. He says, speaking of "jeopardy:"

> The subject of this subtitle is in its nature difficult and intricate. It is rendered more so by much conflict in the decisions. So that we are here required to accomplish the not always easy task of following the principles while not departing from the discordant cases.

And then he proceeds to accomplish a task that he fails to accomplish and which is utterly impossible of accomplishment. How is it possible to follow the principles without departing from discordant cases?

When we look at the encyclopedia we encounter the same difficulty. If there was an absolute definition of "jeopardy," if we could all define what "jeopardy" meant, there would be no trouble about this bill; but I want an amendment in it that does not reach the word "jeopardy" at all. I want a plain provision, as they have in some of the States, that when a man is once tried and acquitted, no matter what the judgment of an appellate tribunal may be, that man shall not be tried over again; and even if it is surplusage, it does not hurt to put it in the bill. Let us see what is said in the encyclopedia about this word concerning which the cases are in conflict:

> The general rule established by the preponderance of judicial opinion and by the best-considered cases is that when a person has been placed on trial on a valid indictment or information before a court of competent jurisdiction, has been arraigned, and has pleaded, and a jury has been impaneled and sworn he is in jeopardy.

That ought to be the law, but it is not. Then the author goes on to say:

> But in some jurisdictions it is held that jeopardy does not attach until a valid verdict either of acquittal or conviction has been rendered.

And then is given an utterly irreconcilable array of conflicting decisions upon the entire subject.

I want to show you how far my own State has gone. I think the court has gone much further than most States on this subject; and while I do not want to pass any criticism on any case in my own State, I can not find a case that sustains this case. I refer my friends to this case—the case of Hoffman *v.* The State of Maryland (20 Md., 475). A man was indicted for murder, and when the case was in progress the State's witnesses—some of the State's witnesses—failed to answer.

This is the case:

> The plaintiff in error being indicted for murder jointly with one Robert Miller by the grand jurors of the State of Maryland, for the city of Baltimore, and being arraigned, severed in his defense, and pleaded not guilty. On the 25th of October, 1859, a jury was impaneled and sworn. The State's witnesses being called did not answer; attachments were issued, and the court was adjourned to the 26th of October, 1859. The attachments being returned non est, the following proceedings were entered of record.

I will not read the entire proceeding.

In this case the jury was discharged. When the man came to be tried over again he put in the plea that he had been once in jeopardy. That man was in jeopardy, but the court said not. If that is the law, then the State can abandon the case at any time while it is in progress, because some of the State's witnesses are returned non est. The State might go on with its case, the defendant might be ready, and some of the State's witnesses might either be returned non est or not be present, and the prosecuting attorney, not being able to prove his case, the jury would be discharged and another indictment found. That man is in jeopardy. There are any number of authorities that hold that the defendant is in jeopardy in a case of that kind. That illustrates the conflict.

But the worst trouble we encounter in regard to the meaning of "jeopardy" is in the Federal courts. We have a case in 195 United States, which is about as troublesome a case as you can find, and I want to call particular attention to this case. There was a man tried before a court and acquitted. They wanted to try him over again, and, while it is true that a ma-

jority of the court held that he could not be tried over again in an appellate tribunal, there were three dissenting opinions in that case—the dissenting opinions of Justices Holmes, McKenna, and Brown. In that case is quoted the leading common-law case, the case of Wemyss *v.* Hopkins (Law Reports 10, Queen's Bench, 378), where it was held that a conviction before a tribunal of competent jurisdiction, even without a jury, was a bar to a second prosecution. That case was as follows:

The appellant had been summarily convicted before a magistrate for negligently and by willful misconduct driving a carriage against a horse ridden by the respondent, and was afterwards convicted on the same facts for unlawful assault.

It was held that the first conviction was a bar to the second, and Blackburn and Lush rendered the celebrated opinion with which we are all familiar, because it is one of the leading cases at common law upon the subject of jeopardy, and they held that the defendant could not be tried over again.

In order to show the Senate what a dilemma we are in, just listen for one moment. Let us look at the Federal case in 195 United States. Mr. Justice Holmes announced a dissenting opinion. Here are three judges who dissent and hold that a man can be tried over again. If there had only been one judge absent and one more judge dissented, you would have had a divided court on the question. I am not criticising the opinion of Justice Holmes, but just listen to this opinion for one moment and see if it does not occupy an isolated position upon the proposition before us. Judge Holmes says you can try a man as many times as you want, provided you never leave the case. That is what you are doing in this bill. You are going to hang a man up and suspend him until, through the machinery of the Federal court, you may finally convict him. I am giving you word for word here what Justice Holmes held in this case:

It is more pertinent to observe, and it seems to me that logically and rationally a man can not be said to be more than once in jeopardy in the same cause, however often he may be tried.

You can try him just as often as you want, provided you try him in the same cause, and he is never in jeopardy.

The jeopardy is one continuous jeopardy from its beginning to the end of the cause. * * * There is no rule that a man may not be tried twice in the same case.

I say, respectfully, there is a rule—a rule ever since the beginning of the common law—that a man can not be tried twice in the same case.

Mr. SPOONER. What is the case?

Mr. RAYNER. This is the opinion of Mr. Justice Holmes in the case of Kepner *v.* The United States, the Philippine case (195 U. S.), and Justice Holmes is a man of profound learning.

Mr. KNOX. Is not that a dissenting opinion?

Mr. RAYNER. I say it is a dissenting opinion. Three judges dissented. If another judge had dissented and one judge had been absent, you would have had a divided court on a definition of jeopardy.

Mr. SPOONER. Can the Senator from Maryland conceive of any means by which stability of opinion upon such a question can be absolutely assured for all time in the court?

Mr. RAYNER. I do not know of any way in the world in which you can do it, and for that reason I want a plain provision in this bill that a man once tried shall not be tried again, jeopardy or no jeopardy. Then the court can decide whether he has been in jeopardy. But once tried and once acquitted, no matter on what point tried and acquitted, that ought to be the end of that man's trial. I have not used the word "jeopardy" in the amendment. I want to steer clear of it. I am afraid of it.

Mr. SPOONER. The object of the amendment is to guard a man against an erroneous decision of the Supreme Court of the United States as to the meaning of the word "jeopardy" in the Constitution.

Mr. RAYNER. That is not at all the object of the amendment. He is guarded now against jeopardy. I say when you take him to the Supreme Court, let the Supreme Court rule upon the question, so as to have uniformity of decisions. If it is possible to get from the Supreme Court uniformity of decisions upon any question, let us have it, but let the decision only apply to future cases.

Mr. KNOX. I wish to ask the Senator a question. When you speak of a man being "acquitted," do you mean technically acquitted by the verdict of a jury or dismissed by the court and freed from the burden of trial for any other reason? I want to know the sense in which you use the word "acquitted."

Mr. RAYNER I mean where there has been a verdict of not guilty, whether by the court or the jury, and judgment on that verdict. That ought to be the end of that case. It has been the end of the case for hundreds of years until this legislation was precipitated here. I am coming to the reasons that brought about this contemplated legislation. I am opposed to the whole spirit of it, from the beginning to the end. My objection goes a little deeper than any objection I have stated yet.

Mr. President, let me finish the opinion of Justice Holmes:

If a statute should give the right to take exceptions to the Government, I believe it would be impossible to maintain that the prisoner would be protected by the Constitution from being tried again.

Mr. NELSON. Will the Senator allow me a question?

Mr. RAYNER. Certainly.

Mr. NELSON. Is it the contention of the Senator from Maryland that where an indictment has been quashed or a demurrer to an indictment has been sustained, the defendant can not be tried again? Do not all the authorities hold that in all such cases if the indictment is bad the case may be submitted to another grand jury and the defendant may be indicted and tried again on a new indictment? It does not follow that the quashing of an indictment or the sustaining of a demurrer or a motion in arrest of judgment terminates the prosecution. In all those cases if the indictment is bad the court can order the case to be submitted to another grand jury and the defendant can be reindicted and tried.

Mr. RAYNER. The Senator from Minnesota has asked three or four questions, and he has given three or four answers, I suppose satisfactory to himself; I am sorry to say not to me. We must discriminate. Law is a science of discrimination. You can not jumble up motions in arrest of judgment and motions for defects in indictment and the unconstitutionality of a law in one question.

Let us discriminate, and before I finish I will answer every question the Senator asked, and I will show him that while he is right in one proposition he asserts, he is wrong in the others.

I say to him now, if there is a motion in arrest of judgment for a defect of form, the man can be tried again on another indictment. We all know that. The defendant at the proper time makes a motion in arrest of judgment for defect of form. The court grants the motion. It arrests the judgment because of some defect in the indictment. The grand jury can find another indictment against him.

Mr. NELSON. Mr. President——

Mr. RAYNER. In one minute.

Mr. NELSON. I want to call the Senator's attention to a decision of the supreme court of his own State. It is the case of the State of Maryland *v.* William Sutton, where a man was convicted upon an indictment containing two counts, one count charging him with committing the crime of rape and another count charging him with an assault to commit rape. He was convicted. A motion in arrest of judgment was made. The motion was granted. The attorney-general of the State took an appeal to the supreme court of Maryland, and the supreme court held that the motion in arrest of judgment had been improperly granted. Here are the final words of the decision:

The verdict was imperfect, and the matter in issue not so ascertained as that the court could render any judgment thereon, and therefore it was a mistrial. The county court erred in discharging the prisoner. The court should have awarded a venire de novo. Judgment reversed and procedendo awarded. (State of Maryland *v.* William Sutton, 4 Gill's Rept., pp. 494–498.)

There is a case in the Senator's own State where a writ of error was taken to the supreme court of the State upon motion in arrest of judgment.

Mr. RAYNER. I want to say to the Senator from Minnesota that while I am very much obliged to him for giving me a decision in my own State, both my colleague and I are rather familiar with those decisions. Each of us has occupied the office of attorney-general of our State, and I have quoted that case half a dozen times. It shows what I said, that the Senator will not discriminate. Where there is a motion in arrest of judgment and the judgment is arrested, the defendant can be tried again. That is an elementary proposition of law. No one——

Mr. NELSON. What about a motion to quash an indictment?

Mr. RAYNER. Let me answer your questions one by one. We have disposed of the first question. The judgment is arrested on a motion made by the defendant, and one of two things takes place. The defendant can either be tried again under the same indictment, provided the motion in arrest does not go to the indictment, but goes to some other part of the record. If the motion goes to the indictment, there must be a new indictment. There is no use discussing that further. It is an elementary proposition.

Mr. NELSON rose.

Mr. RAYNER. I ask the Senator not to interrupt me on this legal proposition. I am coming to the other class of cases in a moment.

Mr. NELSON. Allow me a question in that connection, and that is this: Has not this man, according to your doctrine, been

in jeopardy? According to the doctrine you advocated a moment ago with respect to jeopardy, has not this man been in jeopardy, when a verdict of the jury was rendered upon the indictment and the motion in arrest of judgment made?

Mr. RAYNER. He has never been in jeopardy for one moment, and the Senator will see it, if he will examine the case.

Mr. NELSON. When is a man in jeopardy?

Mr. RAYNER. Let us get down to the cases. He has never been in jeopardy, upon the principle that he has arrested the jeopardy by his own motion, and the authorities state that while the jeopardy may attach, that the jeopardy can be arrested by the motion of the defendant. This is a rule, however, subject to exception.

Mr. KNOX. Mr. President——

The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Pennsylvania?

Mr. RAYNER. Certainly.

Mr. KNOX. May I ask the Senator from Maryland if the provisions of this proposed act do not apply exclusively to motions made by the defendant? A motion to quash is a motion made by the defendant; a demurrer to the indictment is the action of the defendant, and a motion to arrest judgment after verdict is the act of the defendant. Now, does not the defendant in all these cases arrest his jeopardy?

Mr. RAYNER. He does not, and I shall show the Senator he does not.

Mr. KNOX. I should like, then, for the Senator to distinguish between the question I have put to him and his answer to the question of the Senator from Minnesota.

Mr. RAYNER. I will; because the defendant need not make any motion in these cases, and yet the indictment may be quashed. I will give the Senator a case. The court can quash it without motion. I will come to that in a minute. I know exactly what the Senator thinks upon that subject. It is not an unbending rule, one not without exceptions, that every time the defendant makes the motion it arrests the jeopardy. But it is an answer to the proposition of the Senator from Minnesota, and that is that a motion in arrest of judgment suspends the jeopardy. Let us take a case.

Mr. KNOX. Let me put a question right here. When is a demurrer by the defendant to the indictment an act of the defendant which arrests his jeopardy?

Mr. RAYNER. I doubt very much whether a demurrer by the defendant to the indictment upon the ground of the unconstitutionality of the act will arrest jeopardy. I am coming to that, and I will give you the cases.

Mr. NELSON. Mr. President——

Mr. RAYNER. Will not the Senator let me proceed for about five minutes?

Mr. NELSON. Will the Senator allow me a question?

The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Minnesota?

Mr. RAYNER. I suppose I will have to.

Mr. NELSON. I do not want to take up the time unless it is satisfactory.

Mr. RAYNER. It is not very satisfactory.

Mr. NELSON. Let me put the case to the Senator from Maryland on the motion to quash an indictment. Suppose the motion is granted and the indictment is quashed. Has the defendant been put in such jeopardy that he can not be tried again?

Mr. RAYNER. That illustrates the point I made. The Senator from Minnesota will not discriminate. You can quash an indictment upon a dozen different grounds. What ground does the Senator speak of? You can quash an indictment for defect of form. You can quash it upon the ground that the law has been repealed. You can quash it upon the ground of the unconstitutionality of the law. You can quash the indictment upon the ground that the grand jury has not been properly impaneled.

Mr. NELSON. Mr. President——

Mr. RAYNER. One moment. The Senator from Minnesota mixes and confuses all these grounds and seeks an opinion upon all of them when an opinion that would apply to one would not apply to the others.

Mr. NELSON. Mr. President——

Mr. RAYNER. Let me proceed. I beg the Senator's pardon. The Senator will have his own time. I want to say that I am not before the Senate to allege that a man can be put in jeopardy twice. I want a provision put in this bill that he can not be tried twice. I want to get rid entirely of the word "jeopardy," and then the Supreme Court can decide in each case whether the defendant has been put in jeopardy or not. But when a man has been once tried and acquitted that ought to be the end of it, jeopardy or not. Let me go back and finish this quotation, because I want to give some authorities on that.

Mr. PATTERSON. Mr. President——

The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Colorado?

Mr. RAYNER. Of course I have to yield, but I would rather not.

Mr. PATTERSON. It is for a question. The question I want the Senator from Maryland to answer is this, having the pending bill as the basis of my question: How in any case can a defendant who has been tried and acquitted make any of the motions that are provided for in this bill? These motions are only made where the ruling is against the Government. A motion to quash must be against the Government. The decision on a demurrer must be against the Government. A motion in arrest of judgment is after there has been a trial and a conviction, and not a trial and an acquittal. If a motion in arrest of judgment is sustained—and that is the only one of the three cases in which there can have been a trial—the motion in mind to be presented to the court—if the defendant has been tried and convicted and then he interposes a motion in arrest of judgment and his motion is sustained, and then a writ of error taken to an appellate tribunal, that is not a case in which the defendant has been tried and acquitted, and he can be put to trial again. It is a case in which he has been tried and convicted, but the court for technical reasons, whatever the reasons may be, sees fit to arrest the judgment that would follow on the verdict of the jury or the finding of the court in that case, and the case goes to the appellate tribunal. If there should be a reversal, I can not understand how a man is put in jeopardy the second time, because he has never been acquitted.

It is always in case of a trial and conviction in the matter of an arrest of judgment, and in the other two cases, a motion to quash or a demurrer, the motions must ex necessitati be made before jeopardy attaches.

Mr. RAYNER. Is that your question?

Mr. PATTERSON. It is one of those questions which I could not put without making a speech.

Mr. RAYNER. I know; but I have made that same speech. I agree with you entirely in every word you say. That is what I have been trying to show to the Senator from Minnesota. Let the Senator from Colorado convince the Senator from Minnesota, not me. I agree with him. When a judgment has been arrested—I will say for the third time—the man is not in jeopardy.

Let us get on to another matter. I have said twice that no one can contend that where a judgment is arrested on motion of the defendant he has been in jeopardy.

Mr. PATTERSON. But how can any provision of this bill put him in jeopardy?

Mr. RAYNER. If you will let me come to that, I will gladly do so. In the cases I have cited here I have reached the point where everyone on this floor must admit that there is a great conflict of decisions upon the definition of the word "jeopardy." I have already stated the ground upon which I want this amendment put in the bill. I have gone along and said that where upon motion of the defendant judgment is arrested, he is not in jeopardy. If you will only let me get to the cases where it is doubtful whether he is in jeopardy or not, a class of cases I want to reach, then I will get to the end of this argument. I want to finish what Justice Holmes says in this opinion, which is more important than other collateral matters which do not affect the question here at all. I will read it again, and I ask the attention of the Senate to it:

> If a statute should give the right to take exceptions to the Government, I believe it would be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor than he would be when retried for a mistake that did him harm. (Kepner *v.* United States, 195 U. S., 135.)

Mr. President, now let me give a class of cases where the trouble occurs. Suppose, for instance, a defendant is put on trial. He is arraigned, pleads not guilty, employs counsel, the testimony for the prosecution is heard, the testimony for the defense is heard, and at the end of that case the court mere motu, not upon the motion of the defendant, announces upon an examination of the authorities that it believes that the act under which the prisoner has been indicted is unconstitutional, and it acquits the prisoner. Should that prisoner be tried again? You can not answer that question, because there are half a dozen cases one way and half a dozen the other, and, with the greatest respect to the eminent members of the profession on this floor, that question can not be answered satisfactorily—whether the man has been in jeopardy. With the great respect I have for the opinion of the Senator from Colorado, he can not

answer it, because if he says the man has been put in jeopardy he will be met with authorities which say he has not been, and if he says he has not been he will be met with authorities that say he has been put in jeopardy.

Another case. These are not moot cases. They have occurred in the different States. It is a familiar practice in my own State for a court to decide a case on points never raised by counsel. My distinguished colleague and I once had a very important case in Maryland, and we thought we understood it. We argued it below, and we won the case. It went to the court of appeals, and we thought we had thoroughly argued it, and after we had finished the court decided the case against us upon a point that never occurred to either counsel on either side of the case, and there the decision stands. Over and over again our courts decide cases upon points that are not raised by counsel.

Let me give two other cases. I am not dogmatic upon this point.

Having studied the question, having annotated the authorities upon the subject of jeopardy, I am in great doubt as to what jeopardy means, and I want a plain provision in this bill, not defining what "jeopardy" means—I can not do that; I am aware of that; I can not give a legislative construction to a constitutional provision—but I want a plain provision put in this bill—not an invention of my own, but copied from the statutes of some of the States and copied from a law that you gentlemen passed here in the Senate—providing that in no case where the defendant had been acquitted shall he be tried again, no matter what the ruling of the appellate tribunal may be.

Let me give you another case. You go on to trial. The man is arraigned. He pleads. He employs counsel. The testimony for the prosecution is taken. The testimony for the defendant is taken. At the close of the case the court says upon an examination of the statutes it has come to the conclusion that that statute has been repealed by subsequent legislation; and we know that sometimes among these hundreds and hundreds of Federal statutes, with their unjust and unmerited punishments, it is almost impossible to tell whether a statute has been repealed by implication by the enactment of subsequent laws. Ought that man to be tried again? He has been ready for his trial. He has called his witnesses. He has employed counsel. He is ready to go before the jury. The court holds that the statute has been repealed. The prosecuting attorney takes the case to the Supreme Court of the United States and it says, "The law has not been repealed." Ought that man to be tried again? I am not prepared to say that that man has been in jeopardy. I am not prepared to say that that man has not been in jeopardy. I am prepared to say that that man ought never to be tried again in any tribunal governed by the common law.

Mr. KNOX. Mr. President——

Mr. RAYNER. One moment. Let me give you one other case.

Mr. KNOX. Will the Senator permit me to put one question? It will not be long.

The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Pennsylvania?

Mr. RAYNER. Certainly.

Mr. KNOX. I think it goes to the meat of your amendment and to the point of this bill. The amendment of the Senator from Maryland, I understand, is that there shall be no retrial after a man has been acquitted. Am I correct in that statement? That is the substance of the amendment—there shall be no trial after the defendant has been acquitted.

Mr. NELSON. Acquitted by the verdict of a jury.

Mr. RAYNER. I have in the amendment no such words as "acquitted by the jury." I have nothing to do with the jury. He may be acquitted by a magistrate if it is on the merits, as it was in the common-law case. There it was a trial before a parliamentary magistrate on the merits. That ought to be the end of that man's trial, and no supreme court on earth ought to have the power to try that man again. I do not care by what tribunal he is acquitted, if it is a tribunal of competent jurisdiction.

Mr. KNOX. Now I will finish my question, with the permission of the Senator from Maryland.

Mr. RAYNER. The Senator from Minnesota interrupted me.

Mr. KNOX. I do not want the Senator to understand necessarily that my questions all indicate antagonism to the views he has set forth here this morning, because there are many things the Senator has said with which I agree entirely. But for the purpose of considering the amendment I should like to have the Senator indicate where under this bill there is any writ of error or appeal given to the United States where the defendant has been acquitted.

Mr. RAYNER. What is the verdict in the case I have given? What verdict does the court find? Where the court holds that the law is unconstitutional, what is the verdict in the Senator's State?

Mr. KNOX. Courts do not render verdicts with us; juries render verdicts, and the courts pronounce judgments.

Mr. RAYNER. It is not that way in our State. A court may render a verdict and a court may pronounce judgment, because the prisoner has a right to be tried before the court, and you can not deny him that right. The practice is different in the different States. Let us take a jury trial, however, and suppose that proceedings have progressed to the point I have indicated, and then the court holds the law unconstitutional. What is the verdict and what is the judgment in that case? What is done in that case in the Senator's State, if he knows? The Senator does not know and no one knows——

Mr. SPOONER rose.

Mr. RAYNER. What is done in the State of Wisconsin in a case of that sort?

Mr. SPOONER. I did not hear the Senator.

Mr. RAYNER. You heard the case—my illustration?

Mr. SPOONER. No; I did not.

Mr. RAYNER. I beg pardon. A man is arraigned on an indictment. He pleads not guilty. He employs counsel. The testimony for the prosecution is heard. The testimony for the defense is heard, and the defendant is ready to go before the jury. And at the end of the case the court says that upon an examination of the statute it believes the statute to be unconstitutional, and it quashes the indictment upon the ground of the unconstitutionality of the statute upon which it is founded. What is the verdict and the judgment in Wisconsin? I know what it would be in my own State, but not in any other State.

Mr. SPOONER. The court would direct an acquittal by the jury.

Mr. RAYNER. Do you think that man ought to be tried again?

Mr. SPOONER. I will get to that.

Mr. RAYNER. I want you to get to it, and get to it slowly and surely. I say under this proposed statute you could try that man again. That is my point, as I have indicated to the Senator from Minnesota. That man will be tried again under the proposed statute. In other words, you open the doors under this proposed statute. If there was no appeal taken the man could not be tried again.

Let me give another case, a case that comes right home to this bill. Suppose there is a plea of limitations. Suppose a man is indicted. I want to say to Senators I have had little criminal nisi trial practice; I do not want it. I tried two criminal cases, murder cases, when I first came to the bar, for the prisoners, and I felt worse than either of the men did.

Mr. PATTERSON. Mr. President——

Mr. RAYNER. One minute. I say I felt worse than did either of the men, who ought to have been hanged, and I made up my mind that I could not practice criminal law at nisi prius. About a week after that time I was offered the position of State's attorney for Baltimore city, which I accepted for the moment, but in about a week I came to the conclusion that I could not prosecute a man. I felt every time I prosecuted a man that I was prosecuting his wife and children. I have, as attorney-general, had four years' practice in the appellate tribunals, and it became my duty, in connection with the State's attorneys for the different counties and cities, to try these cases.

My colleague has had the largest criminal trial practice in the State of Maryland—perhaps as large a criminal trial practice, as well as any other practice, as any lawyer here. I think he agrees with me upon the views I have taken.

I am speaking now of what is the law, and I want to be distinctly understood, so as to have no mistake about it. I am not defining jeopardy. There are questions that can be asked me as to what is jeopardy or what is not jeopardy that can not be answered. I merely say when a man is tried and when he is acquitted he never ought to be tried again. I do not care what he is acquitted on.

Let me give this plea of limitations case now. Suppose a plea of limitations is not filed in time. In our State we file what is called a ne recipiatur—that the plea be not received. Suppose the Government files a plea of ne recipiatur and the court overrules the plea and the Government takes an appeal. An acquittal is directed upon the plea of limitations. Now, can you try that man over again? One author say you can. Another says you can not. The Encyclopedia says that when a man has been tried upon the plea of limitations you can not try him over again. He has risked his case upon the plea of limitations, has been acquitted, and you can not try him over again. In this bill you permit him to be tried over again, be-

cause you take an appeal to the Supreme Court, and the Supreme Court holds that the plea of limitations was not filed in time, that the man has never been put in jeopardy, and he is tried over again.

In order to show my friend that this amendment is not new, that this is no innovation of my own, I want to put in what was stricken out in the original bill. Why did the Judiciary Committee strike this out? The words that were stricken out of the original bill occur on lines 6, 7, and 8. Read it and it will not be considered that my argument has anything peculiar at all about it or that there is anything novel about the point I am making. Lines 6, 7, and 8 read:

That if on such a writ of error it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside.

Why was that taken out of the original bill? Why was it not left in there? I want that put back. It is the best thing that you can do—to put this back into this bill. It was put into the District of Columbia bill. There is therefore nothing startling about it. I am just trying to extricate ourselves from this howling wilderness of confusion upon the subject of what constitutes legal jeopardy. Here is the District of Columbia bill that the Senate passed giving the appeal:

Provided, That if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside.

Not only that, but you will find this same provision in the laws of Arkansas, of Nebraska, and of Nevada. I like the Nevada law better than I do any other. In Arkansas it is provided that judgment in favor of the defendant which operates as a bar to future prosecution of the offense shall not be reversed by the supreme court. In Nebraska you find a provision that—

The judgment of the court in the case in which the bill was taken shall not be reversed nor in any manner affected.

This is good law. Why not put this in?

But the decision of the supreme court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may afterwards arise in the State.

Why not put the Nevada law in? In Nevada there is a provision that an appeal taken shall in no case stay or affect the operation of a judgment in favor of the defendant.

Texas has a provision in her constitution that an appeal shall not be taken by the State. I think the Senator from Texas, perhaps, will tell me whether I am quoting the points correctly or not in the constitution of Texas, giving no right of appeal at all in criminal cases to the State. Twenty States have refused to give the right of appeal in criminal cases, and out of the other States that have given them half of them have a provision similar to my amendment. They are not defining "jeopardy," they are simply reiterating a principle which has existed from time immemorial, that when a man is once tried and once acquitted, no matter by what tribunal, if it is a tribunal of competent jurisdiction, he shall not be tried again.

Now, in conclusion, I do not propose to go to work and pass a law for 80,000,000 people to remedy the erroneous judgment, perhaps, of a judge in a single case, and that is all that this law seems intended for. We never heard of it until that decision. I want to say that I believe that decision was right. I have carefully examined it. I think if Judge Humphreys——

Mr. NELSON. Will the Senator allow me to interrupt him?

The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Minnesota?

Mr. RAYNER. Certainly.

Mr. NELSON. I want to call the Senator's attention to the fact that in the very case to which he refers no appeal could have been made under this bill. No appeal on a writ of error could have been taken under this bill for the reason that the issue of fact was submitted to a jury and the jury found in favor of the defendant upon that plea in bar. Under this bill that case could not be appealed to the Supreme Court of the United States.

Mr. RAYNER. That is just what I have said. I said you could not have taken an appeal.

Mr. NELSON. Not in that case, because the defendant had been in jeopardy. He had been tried by a jury on that issue.

Mr. RAYNER. I said you could not have taken an appeal in that case, and that is the reason why this law is proposed. It is to give an appeal in a case of that sort.

Mr. NELSON. This proposed law does not give an appeal in a case of that kind. It gives an appeal from the decision or judgment sustaining a special plea in bar when not put in jeopardy.

Mr. RAYNER. You can raise precisely the same question by a special plea in bar. The Senator from Minnesota knows why this law is being urged and precipitated. As far as I am concerned, I do not suppose anyone has stood out here longer and more strongly than I have against all the combinations of railroad companies or trust companies or any other companies when they are violating the law. I have gone to the extreme point on that question, and I stand here ready to enforce the law with the severest punishment when there is any violation of it.

But I am not prepared to pass such a law to-day for 80,000,000 people, perhaps because a judge has made a mistake in a given case. I think the judge was right, but even if he was wrong I am not in favor of changing the common law. This is a perilous matter that we are engaged in. This is a perpetual matter. We have gone along for over a hundred years without it and now in a moment we are to revolutionize the practice of the appellate tribunals of the United States. We have gone along for centuries under the common law without it and now, because a judge in a given case gave an opinion that did not suit somebody, we are asked to pass a law which endangers the liberty of our citizens. Men may not have been put in jeopardy, and there are hundreds of cases where a man ought not to be tried again whether he was put in jeopardy or not.

The Senators from the South have seen men dragged from their homes to northern prisons for violations of law that they were innocent of. We are not so much concerned with the common carriers violating the law and with people violating the Sherman trust act in my jurisdiction. I am not afraid to trust the inferior courts of the United States with the adjudication of those cases. Find better judges and you will have better decisions, and if your judges are not honest, then there is a remedy.

Let me give you, in conclusion, a case that expresses my sentiments better than I can, from a great judge, and one of the greatest judges who ever sat in a State tribunal of this Union. Let me read what he says about this condition and I will finish what I desire to say.

The Senator from Georgia [Mr. BACON] knows these judges. He was a student with one of them. They are great names with us in Maryland—Joseph Henry Lumpkin and Eugenius A. Nisbet. This is Judge Nisbet's opinion. It is very short. I want to give it to you. Speaking of jeopardy, he held that a writ of error did not lie to the court in a criminal case at the instance of the State, except to settle future cases. It ought never to lie. If the constitutionality of a law is involved, let the Supreme Court of the United States decide upon the constitutionality or the unconstitutionality of the law. I am perfectly willing to vote for a law of that sort, and that decision will be binding thereafter in every case that arises upon the law. But I am unwilling to go beyond that. I am not willing that the case should have a retroactive effect, virtually an ex post facto effect, and convict a man who has been already acquitted before a tribunal of competent jurisdiction. Now, let us see what was said in this case:

These principles are founded upon that great fundamental rule of the common law, "Nemo debet bis vexari pro una et eadem causa," which rule, for greater caution and in stricter vigilance over the rights of the citizen against the State, has been in substance embodied in the Constitution of the United States.

That means what I have been contending for to-day, that no man should be twice tried for the same cause.

The trial of a citizen for a violation of the criminal law is a very different thing from the trial of civil rights between two citizens. The forms of procedure and the principles upon which they proceed are different. * * * If there is, by reason of the offense charged, an injury done, especially to any one person, he has a remedy for the wrong. In criminal trials the State—the supreme authority, that authority which makes the law and prescribes its penalty and executes its judgments—moves against the citizen. * * *. It is a salutary precaution in favor of the citizen against an abuse of the sovereign authority; for history teaches the melancholy truth that however fenced and guarded, limited, and defined by laws or usages, it sometimes breaks over all these barriers, defies the sentiment of the world, and, in the name of the law, violates justice and outrages humanity. The reign of the Stuarts in England illustrates these views. That the state will not, in this signally favored country, thus abuse its powers, is not only hoped, but believed. Vigilant for right and liberty, we will not trust her, but hold her steadily to the just limitations within which the wisdom of other states and past generations have circumscribed her.

Now, Mr. President, in conclusion, I am opposed to this law upon still another and a broader and a higher ground.

The VICE-PRESIDENT. The Senator from Maryland will kindly suspend while the Chair lays before the Senate the unfinished business, which will be stated by the Secretary.

The SECRETARY. Table Calendar 26, Senate resolution 214, by Mr. CARTER.

Mr. NELSON. I ask that the unfinished business be temporarily laid aside.

The VICE-PRESIDENT. Without objection, it is so ordered. The Senator from Maryland will proceed.

Mr. RAYNER. Mr. President, I could not state my conclusion any better than the Senator from Maine [Mr. HALE] stated

it the other day. Just in a few words, as concisely as it could be put, he made the whole objection that lies to this bill. I am opposed to it upon the grounds stated by him. I am opposed to it, but, as I have said, upon a broader ground.

We are here, Mr. President, day by day legislating in the interest of centralization. The Executive, it seems to me, is day by day encroaching upon constitutional limitations; and now we are to commence with the judiciary and enlarge the powers of the Supreme Court, and give it a jurisdiction which, in my judgment, violates the cardinal principles of the common law, is against American precedent, and, what is worse than all, infringes upon the Constitution of the United States.

Mr. President, you can count me out of this performance. I do not know how long I will remain here, but so long as I am here I will to the last degree with all my humble strength resist every enlargement of Federal power, whether in the hands of the legislative, the executive, or the judiciary departments, that is not demanded by the absolute requirements or necessities of the American people.

Mr. KNOX. Mr. President, if I entertained any such view of this proposed legislation as suggested a few days since by the Senator from Maine [Mr. HALE] and repeated to-day by the Senator from Maryland [Mr. RAYNER], I would be most earnest in my opposition to the bill.

The Senator from Maine stated exactly my position when he said that the old-fashioned doctrine that a man should not be placed twice in jeopardy of life or limb for the same offense was good enough for him. It is good enough for every American citizen, and whether he willingly yields his assent to that doctrine or not, it is the doctrine of the Constitution, and he must bend to it.

Mr. President, if I thought there was a single line, or a sentence, or a clause contained in this bill which by any court would be construed to place a man twice in jeopardy, I would vote to cut it out, not because there would be any necessity for cutting it out, as it would be invalid under the Constitution of the United States, but I would vote to cut it out upon the ground that it would not be an artistic and intelligent bill with such a provision within its borders.

Mr. President, before proceeding to say anything—and I propose to say very little—as to the merits of the bill, I wish to correct an impression that the Senate must have from what the Senator from Maryland has just stated, that this is an entirely new proposition; that it has been sprung on the Senate because of some very recent things that have occurred in the judicial history of the United States. Such, Mr. President, is not the case, and in respect to this I speak of personal knowledge, because I can say to the Senator from Maryland that as long ago as 1902 I had the honor, in a report to the Congress of the United States, when I held the position of Attorney-General of the United States, to recommend this legislation to Congress; and it is my impression that I was not the first Attorney-General to make that recommendation.

Mr. President, this legislation is along the line of the law as it is understood in England under the common law. It is along the line of the action by a great majority of the States of the United States. In England the Crown always had the right to an appeal in a criminal case. In my own State since its foundation the right has been conceded. Our courts have always said that it exists except where limited by statutory provision. If I had the time I could enumerate from the report of the committee at least twenty-eight States where the provisions of their statutes are substantially the same as those contained in the pending bill.

Mr. President, the question of what or what is not jeopardy is a most material one for our consideration. I quite agree with the Senator from Maryland that it is extremely difficult to define what jeopardy is; and we get our best notion of jeopardy from the decisions of the courts which say what is not jeopardy under the particular circumstances.

I quote from the law writers:

Jeopardy, in its constitutional and common-law sense, has a strict application to criminal prosecution only. (In re McClaskey, 37 Pac., 854, 858, 2 Okla., 568.)

A defendant is not in legal jeopardy within the meaning of the constitutional restriction until he has been put upon his trial before a court of competent jurisdiction, upon an indictment or information which is sufficient in form and substance to sustain a conviction. Thus a plea of former jeopardy, which merely alleged that defendant had formerly been informed against for the same offense, but did not allege that he had been put on trial, was demurrable. (Klein *v.* State, 60 N. E., 1036, 1037, 157 Ind., 146, citing Cooley, Const. Lim., 6th ed., 399; Rowland *v.* State, 126 Ind., 517, 26 N. E., 485; Dye *v.* State, 130 Ind., 84, 29 N. E., 771.)

Where an indictment was so defective that, if the defendant had been convicted under it, he could have had any judgment entered up against him reversed, there is no jeopardy, and the solicitor is authorized to ask for a nol. pros and indict anew. (White *v.* State, 49 Ala., 344, 347.)

Where an indictment is quashed on demurrer, the defendant is not in jeopardy under it, and may be prosecuted under a second indictment for the same offense. (State *v.* Gill, 33 Ark., 129, 131.)

"Jeopardy" is not synonymous with the words "twice put on trial," and there is a wide difference between a verdict given and jeopardy as a verdict whenever the jury are charged with the person, and the offense—

And this comes nearer being a definition of jeopardy than any I have been able to find—

whenever the jury are charged with the person, and the offense is punishable by death, and the indictment is not defective, he is in jeopardy of life, and accordingly, if discharged without a verdict, he can not be tried again. But where a person is put on trial under a bad indictment he may be tried again, though acquitted, because his life was not in jeopardy, and the court could not have given judgment against him if he had been convicted. (United States *v.* Gilbert, U. S., 25 Fed. Cas., 1287, 1300.)

Jeopardy does not attach if, after a verdict against accused, it has been set aside on his motion for a new trial. (People *v.* Travers, 19 Pac., 268; 77 Cal., 176.)

Jeopardy does not attach if, after a verdict against accused, it has been set aside on arrested judgment. (People *v.* Travers, 19 Pac., 268; 77 Cal., 176.)

Jeopardy is not considered as attaching, although the jury has been sworn, if the defendant is erroneously convicted and obtains a reversal of judgment. (Lovett *v.* State, 14 South., 837, 838, 33 Fla., 389; People *v.* Travers, 19 Pac., 268, 77 Cal., 176.)

By "jeopardy," within the meaning of the Constitution, is meant lawful jeopardy from the commencement of the proceedings until their termination by a proper judgment and sentence or acquittal, or what the law regards as such. Where, either for want of jurisdiction or from some defect in the indictment, or from such error in the course of the proceedings, the verdict is set aside or the judgment arrested on a writ of error brought by the defendant or on a motion made by him, and he is tried again, he is not thereby put in jeopardy a second time. (Commonwealth *v.* Wheeler, 2 Mass., 172, 174; Commonwealth *v.* Peters, 53 Mass., 12 Metc., 387; Commonwealth *v.* Roby, 29 Mass., 12 Pick., 496, 502; Commonwealth *v.* Laby, 74 Mass., 8 Gray, 459; Commonwealth *v.* Gould, 78 Mass., 12 Gray, 171; McKee *v.* People, 32 N. Y., 239; People *v.* McKay, N. Y., 18 Johns., 212; State *v.* Walters, 16 La. Ann., 400; Jones *v.* State, 15 Ark., 261; Turner *v.* State, 40 Ala., 21; Gerard *v.* People, 4 Ill., 3 Scam., 362; State *v.* Redman, 17 Iowa, 329; State *v.* Sutton, Md., 4 Gill, 494; Cooley, Const. Lim., 3d ed., 327; Sedg. St. & Const. Law, 2d ed., 572, 573, note "a." In McKee *v.* People (32 N. Y., 239, 245) it was held that the term has no relation to the reversal of an erroneous judgment and pronouncing a legal one pursuant to a legal conviction. Accordingly, where a final judgment is reversed on account of an erroneous sentence and the case remanded for a proper sentence, the resentence does not put the prisoner twice in jeopardy within the meaning of the Constitution, though he has served a part of his time under the original sentence. (Commonwealth *v.* Murphy, 54 N. E., 860, 861; 174 Mass., 369; 48 L. R. A., 393; 75 Am. St. Rep., 353.)

I ask the indulgence of the Senate to read about a page and a half from Bishop on Criminal Law, volume 1, sections 1024–1030. I have made the selection of these excerpts with the greatest care, and because I think they will be of use to Senators in making up their minds about this bill.

Rights of State to have proceedings reversed.—In England writs of error, the practical object of which is generally to bring whatever appears of record under the review of a higher tribunal, seem to be allowable to the Crown in criminal causes; but the courts of most of our States refuse them and refuse the right of appeal to the State or Commonwealth, except where expressly authorized by statute, as in some States they are. In Maryland the State may have a writ of error at common law to reverse a judgment given on demurrer in favor of a defendant. And in some other States questions of law may, without specific statutory direction, be reviewed by this proceeding or by appeal on prayer of the State. The question is not free from difficulty; but probably some judges have refused the writ to the State from not distinguishing sufficiently between cases in which the rehearing would violate the constitution and cases in which the prosecuting power has the same inherent right to a rehearing as a plaintiff has in a civil suit.

Common law impediments to rehearing.—It should be borne in mind that the constitutional provision under consideration is not the only impediment to the rehearing of a criminal cause. It is the only one not removable by legislation; but, when legislation has not interfered, and the question depends on common-law principles, there may be various other absolute bars to a further trial.

Validity of statute authorizing rehearings.—Whatever the terms of a statute providing for the retrial of criminal causes, or a reexamination of the proceedings, it will not ordinarily be interpreted, and will never have force, to violate the constitutional provision under consideration. If the jeopardy has once attached, there can be no second jeopardy without the consent of the defendant, whatever the statute may direct. It will apply only where it constitutionally may.

Reversal by State after trial.—A statute which undertakes to give to the State the right of appeal, to retry the party after acquittal on a valid indictment, is void. And no writ of error or other proceeding allowed to the State can constitutionally open anew the question of guilt after the jeopardy has attached. Even though an acquittal has been produced by an erroneous direction of the judge at the trial, the result is the same.

But—

Reversal before jeopardy.—Before jeopardy, any reversal of proceedings, whether on prayer of the State or of the defendant, may be had without prejudice to a fresh prosecution.

Thus—

Valid indictment quashed—Judgment on invalid.—If, without a trial, the court quashes a valid indictment, or enters judgment for the defendant on his demurrer, believing it invalid, a trial may be had after the prosecutor has procured the reversal of these proceedings; because, as we have seen, the prisoner is not in jeopardy until the jury is impaneled and sworn. And the same consequence follows where a judgment of conviction has been rendered on an invalid indictment.

But—

Proceedings regular down to trial.—Where the indictment is sufficient and the proceedings are regular before a tribunal having jurisdiction down to the time when the jeopardy attaches, there can be no second jeopardy allowed in favor of the State on account of any lapse or error at a later stage. This doctrine should be considered in connection with what was said under our last subtitle, else it may be misapplied.

For example—

Quashed at defendant's prayer.—If—

And I take it this is the nub of the whole proposition—

If at any stage of the proceedings a defendant procures an indictment to be quashed, he can not be heard to assert, in bar to a new one, that the first was good and he was in jeopardy under it.

Court without authority.—If the court has no jurisdiction over the offense, or derives its existence from an unconstitutional statute, or is holding a term not authorized, or is otherwise without authority in the premises, the defendant is not in jeopardy, however far the tribunal proceeds. In most or all of these circumstances the final judgment is not voidable, as mentioned in a previous section, but void; so that his unreversed conviction is no more a bar to another prosecution than his acquittal.

Concurrent jurisdiction (magistrate's—court-martial).—But if the tribunal has authority, concurrent with another, or exclusive—whether it is an inferior one, as a justice's court, a court-martial, or the court of a municipal corporation, or is a superior one—a conviction or acquittal in it will be a bar to subsequent proceedings in whatever court undertaken.

The plea.—The plea, usually put in at the arraignment, is an essential part of the proceedings. And, until an indicted person has pleaded, he is not in jeopardy, though a jury has been sworn to try him or even though there has been an actual trial. But the similiter appears not to be essential.

Mr. President, from these authorities, it seems to me, the following can be deduced: If a defendant, as is provided by this bill, demurs to an indictment and the court sustains the demurrer, and the prosecutor appeals, and the court sustains the appeal and reverses the judgment on the demurrer, the defendant was not in jeopardy, because he defeated his right to a verdict by his own act.

It is the same in case of motion to quash as well as in case of a motion in arrest of judgment after verdict if the motion is sustained.

Suppose, however, the prisoner is acquitted upon a valid indictment. I agree with the Senator from Maryland [Mr. RAYNER] that no statute could constitutionally open anew the question of his guilt upon any appeal *for errors at the trial*, and this act does not propose to give any such appeal. This bill allows to Government an appeal only from—

Defendant's motion to quash or set aside indictment;
Defendant's demurrer to indictment;
Defendant's motion, successfully made, in arrest of judgment for insufficiency of the indictment;
A judgment sustaining defendant's special plea in bar.

These proceedings are all defendant's acts before a verdict to prevent a trial, except the motion in arrest of judgment, which is defendant's act after a verdict against him to defeat a judgment on the verdict. These motions of defendant rest upon the want of jurisdiction of the court, the unconstitutionality of the statute, or some other lack of right to proceed to trial or to judgment on the verdict, the effect of all of which is to defeat the jeopardy. Mark this: It is not proposed to give the Government any appeal under any circumstances when the defendant is acquitted for any error whatever committed by the court.

We can not give the Government an appeal or writ of error in any case where a judgment of reversal would put the defendant again in jeopardy, and this bill does not undertake to do so. It gives the Government an appeal only when the defendant has been successful in defeating his jeopardy by defeating the trial.

The Government takes the risks of all the mistakes of its prosecuting officers and of the trial judge in the trial, and it is only proposed to give it an appeal upon questions of law raised by the defendant to defeat the trial and if it defeats the trial.

The defendant gets the benefit of all errors in the trial which are in his favor, and can challenge all errors in the trial which are against him. It is certainly not too much when he attacks the trial itself or the law under which it is conducted to give the people the right to a decision of their highest courts upon the validity of statutes made for their protection against crime.

Mr. PATTERSON. Mr. President, the position of the Senator from Maryland [Mr. RAYNER] with reference to this bill, it seems to me, is somewhat of a reflection against either the intelligence or the sense of justice of the members of the Judiciary Committee who reported it. After listening with great care to the remarks of the Senator from Maryland, I am convinced that his attitude arises wholly from a misconception of what this bill intends.

The Senator asks why a certain provision that was in the bill, which came from the House of Representatives, was not retained in the bill as it now stands. The reason is conclusive that the House bill was so completely changed by the Judiciary Committee of the Senate that such a provision would have been wholly improper and have rendered the bill, as reported by the Senate committee, thoroughly inartistic, if I may use that term. The changes made in the bill by the Judiciary Committee show how solicitous the Senate committee was as to the rights and the privileges of a defendant who has been once in jeopardy. The House bill, as it came to the Senate, provided for writs of error to the Supreme Court, or the court of appeals, in every instance, and in every case in which a defendant was entitled to a bill of exceptions and a writ of error; in other words, the bill, as it came from the House, permitted writs of error on matters of evidence given before a jury on the trial of a criminal case; writs of error as to the instructions of the court to the jury; bills of exceptions and writs of error in every possible contingency where they might be demanded by a defendant.

Mr. NELSON. Mr. President——

The PRESIDING OFFICER (Mr. GALLINGER in the chair). Does the Senator from Colorado yield to the Senator from Minnesota?

Mr. PATTERSON. Certainly.

Mr. NELSON. Allow me to make a suggestion in that connection, which is, that the House bill allowed an appeal even where the defendant had been acquitted by the verdict of a jury; which would be altogether meaningless.

Mr. PATTERSON. Yes; and the Senate committee curtailed the bill as it came from the other House and eliminated from it everything that might seem to be responsive to the objections made by the Senator from Maryland, and, instead of allowing writs of error and bills of exception in every case in which a defendant in a criminal case would be entitled to them, the committee limited the writs of error and bills of exception to four particular specific cases, in neither one of which, Mr. President, was it possible for jeopardy to have attached; and because it was impossible for jeopardy to have attached in either of the cases in which writs of error are allowable to the appellate court, the provision in the House bill covering the matter of jeopardy was not incorporated in the Senate bill. Let me read what the House bill was:

That in all criminal prosecutions the United States shall have the same right of review by writ of error that is given to the defendant, including the right to a bill of exceptions.

With that sweeping, broad provision it is absolutely necessary, Mr. President, if the rule of jeopardy is to be preserved, that the provision which the Senator from Maryland insisted should be incorporated in this bill should be in the House bill, which is:

Provided, That if on such a writ of error it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside.

Under the Senate bill there can be nothing which occurred on the trial submitted to the appellate court. Therefore the necessity for the proviso in the House bill does not exist and would be wholly improper in this bill.

Now, Mr. President, is there any jeopardy under any definition, I do not care how broad or indefinite or definite the definition of "jeopardy" may be? I maintain, whatever the definition is, that no jeopardy can attach in cases in which writs of error will lie under the Senate bill, bills of exception and writs of error being, first—

From the decision or judgment quashing or setting aside an indictment.

That is, as a rule, before pleading. The motion to quash an indictment is, as a general rule, filed before the prisoner is required to plead guilty or not guilty. If the prisoner pleads guilty or pleads not guilty in order that the motion to quash may be heard and decided by the court, the plea of not guilty is set aside or held as not having been made.

Mr. SPOONER. And they ask leave of the court to withdraw it.

Mr. PATTERSON. And they ask leave to withdraw the plea of not guilty.

Mr. SPOONER. A request which is always granted.

Mr. PATTERSON. So that nothing that squints at jeopardy has existed up to the time the court has passed upon the motion to quash the indictment.

What is the next?

From the decision or judgment sustaining a demurrer to an indictment or any count thereof.

A demurrer is simply another form of a motion to quash. A demurrer simply reaches the insufficiency of the indictment to put the defendant upon his trial, and therefore it also is interposed before the defendant is required to plead. If he has pleaded before the demurrer can be heard and determined, the request will be made to withdraw the plea of the defendant until the demurrer has been heard and passed upon by the court.

I skip from the second to the fourth because the third ground is one of an entirely different class.

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

A special plea in bar, Mr. President, is a plea that does not relate to the guilt or innocence of the defendant in the sense as to whether he did or not commit the act for which he was indicted. A special plea in bar is that which is set up as a special defense notwithstanding the defendant may be guilty of the offenses with which he is charged; it is for some outside matter; yet it may have been connected with the case. The special plea in bar that was filed by the indicted Chicago packers is a very good illustration of that. Their plea in bar set forth the fact of their having been induced or led, whatever it may have been, to make communications to the law officers of the Government with reference to their business that gave the district attorney information which enabled him to bring about the indictments and to help in their prosecution. That had no reference to the guilt or innocence of the accused. It was a pleading of fact that was independent of the crime for which those packers had been indicted.

Therefore, Mr. President, there could be no jeopardy in a case of that kind where there was a decision upon the special plea in bar, because it is not under a plea of guilty or not guilty that the insufficiency of a special plea in bar is determined; it is non obstante whether the defendant is guilty or not guilty.

In neither of these three instances, Mr. President, is it possible that there could have been jeopardy in any sense under any definition that can be found in the decisions of any court of record. So that all that the Senator from Maryland has said upon the subject of preserving to an accused all the rights and privileges that attach to the rule of jeopardy, as we find it contained in our constitutions and the records of the courts, had nothing whatever to do, nor did it relate in any wise to either of the cases in which the writ of error would lie, to which I have called the attention of the Senate.

From the decision arresting the judgment for conviction for insufficiency of the indictment.

Mr. President, it is utterly impossible that a writ of error would lie in a case where a defendant had been found not guilty. The motion in arrest of judgment can only be made—it is wholly inapplicable to any other condition than that of conviction—to a verdict of guilty. It is interposed after a verdict of guilty and before judgment for an alleged legal reason that will arrest the court in pronouncing judgment upon the verdict. Therefore if a motion in arrest of judgment is sustained, and the Government takes its writ of error to the court of appeals or to the Supreme Court, it is not a case of putting a man twice on trial for the same offense who had been acquitted in the first instance. It is a case in which the defendant has been tried, in which he has been found guilty on the merits of the case, and by reason of some technicality, if I may use the term in its broad sense, the hand of the court is arrested from imposing the penalty upon him.

So, Mr. President, in either of these cases the writ of error is taken to the Supreme Court, and in each instance it must be taken to the Supreme Court by the Government, because the defendant would have the right to do those things quite independently of the enactment of this bill.

If the Supreme Court shall reverse the decision of the lower court, it is not putting the defendant in jeopardy the second time, for in the case of sustaining the motion to quash he had not been in jeopardy; in the case of a demurrer being sustained he had not been in jeopardy; in the case of a special plea in bar that went against the Government the defendant had not been in jeopardy on the merits of the case; and in the case of the arrest of judgment the defendant had not been in jeopardy, because, Mr. President, he had been convicted; he had not been acquitted; and if the Supreme Court should hold that the action of the lower court in sustaining the motion in arrest of judgment was erroneous, then, Mr. President, the defendant could not complain, either if the judgment of the court shall be entered upon the verdict or a new trial shall be ordered, because it is giving to the defendant a new opportunity to go acquit when, under the trial that was had, he had been convicted.

The reason, Mr. President, that I, as a member of the Committee on the Judiciary, favored this bill is this: Without this bill in the criminal laws there is liable to be the greatest confusion throughout the country. Congress passes a law, and we find that the district court—it may be of Ohio—will render a decision that the law is unconstitutional. The district court in the State of Kentucky may render a decision that it is constitutional. The decision of one district court is in no manner binding or conclusive upon another district court. Decisions of such courts are only persuasive, and not controlling. They may be controlling within the jurisdiction in which they are rendered, but they are not controlling outside of that jurisdiction. And we would have, Mr. President, this strange and extraordinary condition as we have had it—and to my mind it is a disgrace to the judiciary of the country that such things should be witnessed. We have a district court in one jurisdiction holding that a law is ineffective for one reason or another—it may be that it is unconstitutional, or for some other reason—and we have a district court in another jurisdiction holding the reverse; and as the cases multiply in the several sections of the country we may find one half of the courts of the country arrayed against the other half of the courts of the country upon the same identical law; one half holding that it is entirely constitutional and the other half holding that it is unconstitutional. So, Mr. President, that confusion, that ridiculous condition, exists and must continue to exist, because, as the law now stands, until a case involving the question shall go to the Supreme Court and it is brought there by the defendant, there can be no adjudication by a court whose decision and judgment is controlling.

I am quite willing to have it said, so far as I am concerned, that the decision of Judge Humphreys in the Chicago case led to the legislation that is now proposed. Why should it not, Mr. President? If it calls the attention of the country to a condition of our laws that is absurd, that leads to injustice in one half of the country and to justice in the other half, to a condition of our laws that will permit the same law to be held constitutional in one half of the country and unconstitutional in the other half, and have a citizen committing an act that is not an offense in one half of the country but is an offense in the other half of the country, the same act being done without any fear of consequence in certain States in the Union and leading to the penitentiary, it may be, in other States in the Union—if that condition has been brought to the attention of the country and of Congress, Congress has done right to grapple with the question and to make it possible to eliminate such a status from the laws and their enforcement in the United States.

I would have been, Mr. President, as rigorous as the Senator from Maryland in protesting against any interference in any way with the right of protection under the law of once in jeopardy. We can not afford in this country to in anywise weaken the protection that the statute law and the Constitution afford. This bill, Mr. President, in nowise does it. It does not even wink at it, if I may use that term in connection with a grave and dignified subject such as this. The bill is intended to cure a defect in the administration of justice, a defect that should be cured as speedily as possible if the decisions of our courts are to be received with the dignity and confidence that the decisions of all of the Federal courts should meet with throughout the country.

Mr. HEYBURN. Mr. President, I desire to send to the Secretary's desk some amendments which I propose to offer to the bill.

The PRESIDING OFFICER. Does the Senator desire the amendments read at this time?

Mr. HEYBURN. I desire to discuss the amendments.

The PRESIDING OFFICER. The proposed amendments will be stated.

The SECRETARY. On page 2, line 2, after the word "taken," it is proposed to insert "on objection to the sufficiency of the indictment in matters of law;" on page 2, line 21, after the word "objections," to insert the words "by the United States;" and on line 22, after the word "form," to strike out the word "only" and insert the words "or law."

Mr. HEYBURN. Mr. President, if the right of appeal intended to be provided for by this measure is confined to jurisdictional questions, the question of jeopardy passes out of consideration. A man can only be placed in jeopardy by a trial in a court having jurisdiction to try the matter. The amendment which I have proposed confines the operation of the proposed review by the appellate court to the questions of jurisdiction. The question of jurisdiction involves the question of the legality or binding force of the statute under which the man is held for trial. That is a jurisdictional question. It involves the question of the manner of the execution of the law, that it shall be in accordance with the provisions of the statute. That is jurisdictional.

If the courts do not proceed along the lines laid by the statute, then the party has not been in jeopardy under any rule asserted by the Senator from Maryland [Mr. RAYNER] or the Sen-

ator from Pennsylvania [Mr. KNOX] or the Senator from Colorado [Mr. PATTERSON]. He has been in jeopardy only when the trial might result in a binding verdict against him.

In line 2, page 2, I have proposed, after the word "taken," to limit the effect of the right of review, so that it will read as follows:

That a writ of error may be taken on objection to the sufficiency of an indictment in matters of law.

Those words "in matters of law" are broad enough to cover every possible question of jurisdiction.

Then I propose, in line 21, to limit the right to take this appeal by inserting after the word "objection" the words "by the United States;" so that it will read:

That hereafter all objections by the United States to the sufficiency of the indictment in matters of form—

Then I propose to insert—

or law—

And it continues—

shall be made and determined prior to the empaneling of the jury..

It would not be safe to leave out those words of limitation, "by the United States," because to leave them out would prohibit a defendant, who may discover in the hour of the execution of the judgment that the indictment was defective, from entering objection. The defendant should have the right, up to the very last possible moment, to take objection to the legal sufficiency of the indictment. As the bill comes to us for consideration there is no limitation in favor of the defendant. It has often happened that when the trial court has entered judgment and passed sentence upon a defendant and an intermediate tribunal has affirmed the action of the trial court upon a question of law as to the sufficiency of the indictment being presented to a member of the Supreme Court of the United States, a writ for the review of the proceedings of the lower courts has been granted and an order issued suspending the execution of the judgment, perhaps the party having been sentenced to be hanged. So it is absolutely important, if we are to pass this bill at all, that these words of limitation shall be inserted in it. Otherwise it strikes at an existing right of a defendant.

Mr. RAYNER. Mr. President——

The PRESIDING OFFICER. Does the Senator from Idaho yield to the Senator from Maryland?

Mr. HEYBURN. Certainly.

Mr. RAYNER. I am compelled to leave the Chamber for a moment. Will the Senator permit me to add to my amendment just a word?

Mr. HEYBURN. Certainly.

Mr. RAYNER. So as to read "during the trial and verdict or judgment."

The PRESIDING OFFICER. The Senator has a right to modify his amendment.

Mr. HEYBURN. I am confident that the Judiciary Committee did not intend to take away from a defendant any right now possessed by such defendant under the law to appeal from a decision against the defendant. They intended evidently by this legislation to enlarge a right of the Government without interfering with the right of the defendant. Where the court holds that a law is unconstitutional, and that therefore the indictment is bad, because of no authority to bring it, or where the court holds that an indictment is bad, when as a matter of fact it is in conformity with the statute (one going to the right to indict and the other going to the manner of the indictment), I have no particular objection to the right of appeal being given the Government if taken before the trial, in order that the court may determine it at that time, before the defendant is put to the expense and the annoyance and the other incidents of a trial.

Those are instances that already have been in the minds of those who propose this legislation. The decision of Judge Humphreys and the decision of the court in Tennessee on the question of the employers' liability act involved those two questions. I believe if those questions are raised by the United States before the trouble and the expense of a trial the hands of the trial court may safely and properly be stayed until the sufficiency of the law or the sufficiency of the indictment may be tested by the highest tribunal in the land. Then if the highest tribunal in the land sustains the court below, that will be the end of the trial. If the highest court in the land reverses the action of the court below, then the trial will proceed and the defendant will have the benefit of knowing that those questions involving his right to the defense based upon an attack upon the indictment have been adjudicated, and it resolves itself down to a question of fact.

All lawyers of long experience have known of cases where defendants, under erroneous advice that the indictment was bad and that it might be safely relied on to set aside a verdict or judgment upon the verdict, have allowed their cases to be tried carelessly, relying upon these legal questions that afterwards proved to be an insufficient reliance. If those questions are settled before trial, upon appeal by the Government of the United States, the defendant goes to trial with an absolute certainty that the law has been determined; and the amendment which I propose simply provides that the Government shall raise its objections to the indictment before the impaneling of a jury. The party is not in jeopardy up to that time. The machinery of the court has not laid its hand upon him up to that time. He is merely charged, and he has not been brought within the limits of jeopardy. Jeopardy can not exist where there is no jurisdiction, because the question of jurisdiction is an undetermined one until a judgment is executed, and may be raised, as has been suggested, in the various ways—for instance, on a motion in arrest of judgment.

Mr. President, I would be compelled to vote against this bill so long as it would deprive the defendant of the right, up to his last hour on earth, to call the attention of the court to a defect in the indictment or a defect in the proceeding under the statute under which the indictment was found. I could not vote for a bill, no matter how good its other provisions might be, that would take from the defendant that right. This bill as it comes to the Senate does take away from the defendant that right. I would vote for the measure cheerfully if the defendant were protected in his existing right to raise these questions at any time up to the final execution of the judgment, and, coupled with that, if the rights proposed to be given to the United States by this bill are limited. The bill reads now:

That a writ of error may be taken by and on behalf of the United States from the district or circuit courts to the Supreme Court or the circuit courts of appeals, * * * in all criminal cases, in the following instances.

Then it cites the instances appropriate to the accomplishment of this class of legislation. It does not limit the grounds upon which the United States may take an appeal. The United States should never be allowed to take an appeal upon questions of fact or upon the rulings of the court as to the admissibility of testimony pending the trial. The burdens upon those charged with the violation of law are sufficiently heavy at present to put us on guard against adding unnecessarily to them for the accomplishment of a purpose that on its face does not pertain to the rights of the defendant, but to the rights of the Government rather. So I have proposed the amendment limiting the right of writ of error, providing that it may be taken only on an objection to the sufficiency of an indictment in matters of law.

Mr. President, I do not think the provisions in lines 19 and 20 are essential to the bill in any way. The matter of a bill of exceptions will not arise under any of the provisions of this bill. An exception to the ruling of a court is settled under the rules of the court and not by virtue of an act of Congress or of any legislative body. The manner of settlement of a bill of exceptions is provided for by the rules of the court. That a party is entitled to except to the rule is sufficiently provided within the general provisions of this bill. The bill of exceptions is simply an evidence, the party having taken an exception, that that exception has been allowed by the court; and the court does not strictly allow a bill of exceptions. It settles a bill of exceptions to conform to the facts, showing that an exception was taken.

Mr. CULBERSON. Mr. President——

The VICE-PRESIDENT. Does the Senator from Idaho yield to the Senator from Texas?

Mr. HEYBURN. Certainly.

Mr. CULBERSON. I may have misunderstood the Senator from Idaho, but I understood him to say that he wants to amend lines 11 and 12 so as to read:

From the decision or judgment quashing or setting aside an indictment on matters of law.

Mr. HEYBURN. No; the Senator misunderstood me. I have not referred to lines 11 and 12. My amendment is confined to line 2 and to line 21 and to line 22.

Mr. CULBERSON. I note now the proposition of the Senator. I invite his attention to the suggestion that at the present time the United States is not permitted in criminal cases a writ of error on any ground. This bill specifies the grounds upon which that right shall exist so far as the United States is concerned. I will ask the Senator if that does not necessarily exclude all other cases, so that the amendment suggested by him is unnecessary?

Mr. HEYBURN. I think I see the point of the Senator's suggestion, that it is not necessary in line 2 to limit the scope of the writ of error because from line 11 to line 17 the purposes

for which the writ may be taken are defined. But it was because there are many ways of attacking a decision or judgment quashing or setting aside an indictment that I have specified the questions which may be reviewed. An indictment may be quashed or set aside for other reasons than those included within the exception I have stated; and in order that there may be no question as to the grounds on which those objections may be raised, I have limited them to questions of law.

Mr. CULBERSON. Mr. President——

The VICE-PRESIDENT. Does the Senator from Idaho yield to the Senator from Texas?

Mr. HEYBURN. Certainly.

Mr. CULBERSON. With the permission of the Senator, I now have the amendment suggested by him. It has not been printed, but it has been furnished me from the desk. Page 2, line 2, after the word "taken," insert "on objections to the sufficiency of the indictment in matters of law."

Mr. HEYBURN. Yes. The words "in matters of law" are words of limitation.

Mr. CULBERSON. What I wanted to inquire of the Senator is whether there are any objections to an indictment on matters of fact?

Mr. HEYBURN. There are grounds of objection on matters of mixed fact and law, because of the manner in which the law is stated or the facts are stated under the law. Indictments are quashed on those mixed grounds. I desire to confine it simply to the questions of law.

Mr. SPOONER. I do not remember ever to have known a demurrer to an indictment to raise any other question than a question of law.

Mr. HEYBURN. We are not discussing the question of a demurrer. We were discussing the question of a motion to quash an indictment, which, while it partakes of the nature of a demurrer, is something more than a demurrer.

Mr. SPOONER. Oh, yes; that is true. It may go to the validity of the grand jury.

Mr. HEYBURN. It may go to all those questions—the manner of their summons, the manner of their impaneling.

Mr. SPOONER. The matter of their conduct.

Mr. HEYBURN. Yes. Those are mixed questions of law and fact. I would not have such a question reviewed on appeal of the Government of the United States, because it does not test the validity of a statute; it does not test the proper manner of indicting under a statute. I would limit the questions that may be raised by the Government of the United States to a narrow scope, because, as a rule, the question of the manner of impaneling a grand jury, the question of the manner in which a grand jury were summoned, are provided for by different statutes than those which provide for the punishment of the party who is to be tried before the court, and, therefore, are more matters of detail and form than they are matters of legal substance.

Mr. CULBERSON. Mr. President——

The VICE-PRESIDENT. Does the Senator from Idaho yield to the Senator from Texas?

Mr. HEYBURN. Certainly.

Mr. CULBERSON. With the permission of the Senator, I will say that I have listened to his explanation of the amendment, but, rather than appear to acquiesce in his position, I desire to say that I do not yet perceive a case in which a motion to quash or set aside an indictment can raise a question of fact or a matter of fact. The motion to quash an indictment ordinarily is that it states no offense——

Mr. HEYBURN. That is one of the grounds.

Mr. CULBERSON. Against the laws of the Government in favor of which the prosecution is aimed. But I can not conceive of a case—there may be, but I can not conceive of it—where the sufficiency of the indictment on a motion to quash can be said to raise a question of fact. It necessarily, as I understand, raises a question of law.

Mr. HEYBURN. I think I can call the Senator's attention to circumstances under which it would be a mixed question of law and fact—that is, the court would have to determine facts. Suppose, for instance, it was charged by affidavit—because that is the basis of a motion to quash, as a rule, where it is not something that appears on the face of the indictment—that the officer who summoned the grand jury was not such an officer as is authorized by law to summon a grand jury. Suppose the matter of fact was shown by affidavit that members of the grand jury were not citizens of the United States. Those are questions of fact to be determined outside of the record as it appears upon the face of the indictment, and I desire to eliminate those questions, so that the United States will not be permitted to take an appeal from the decision of the court upon that class of questions.

Of course the defendant must be allowed to take advantage of them. The defendant must not be disarmed to any extent whatever in defending himself against the charge of violation of the law. I hope that those instances, while there are other instances, may be sufficient to direct the mind of the Senator to the purpose that I have in limiting this in express terms to questions of law. It is a question of law as to whether or not a person other than a citizen may summon a grand jury. But it is a question of fact as to whether or not the person who did summon the grand jury was a citizen. The question of the citizenship of the members of the grand jury is also a question of fact. Questions of law are necessarily involved in the determination of questions of fact. So I desire to eliminate all such considerations and let the United States have the right of appeal only when the motion to quash, for instance, is based upon the fact that the indictment upon its face is not in conformity with the law under which the indictment is framed. That question may be raised sometimes either by motion to quash or by demurrer. There are circumstances under which either of those proceedings may be selected, but it does not follow that in all cases both of them would be applicable.

Mr. President, if this measure is to be enacted into a statute in such manner as to widen or broaden the present rights of the Government in the prosecution of those charged with offenses so as to take away a single existing right of the defendant, then it should be defeated. If we can not so legislate as to give the Government the right on its own motion to test the validity of statutes under which it seeks to punish offenders against the law without infringing the rights of the defendant, then the Government had better rest as it has rested for a hundred years.

This is one of the gravest questions that have come before the Congress of the United States at any time. The presumptions are all against it, because it has been for a hundred years thought quite sufficient for the preservation of the rights of the people and the rights of the individual that the law should remain as it is, and only legislation that will eliminate the conjectural question of jeopardy is safe legislation on this subject. Any legislation that leaves that question to be determined or to rest upon the uncertain and varying decisions of the courts is dangerous. Only by carefully guarded language in this bill against the possibility of the question of jeopardy entering into the interpretation and the application of it can we make this safe legislation, and not otherwise, because that question is involved in too much uncertainty. That is a mixed question of law and fact, too, sometimes. It is determined upon strictly legal grounds, but it involves a consideration of conditions and circumstances that ought not to enter into the construction of a law of this kind, which is a radical change and about-face proposition in the jurisprudence of this country.

No more important question arises than that of the rights of individual against the whole people, and when a person is arraigned to answer a criminal charge in the courts, then it is all the people against one, and no safeguard should be removed from that one. There is an element of danger in this bill to that one person who is on trial. We have no right to overlook any possible safeguard that that person now has. Rather had we better add to than take away from.

The instances under which this question arises in the courts are not numerous. It has arisen only in a few instances where the Government has been dissatisfied by the determination of courts of law of the rights of the individual under the law, and the instances in which these questions have arisen and have been impressed upon the attention of the people are semi-political. The questions have arisen out of the political law rather than out of the criminal law, the violation of political statutes rather than statutes affecting the safety of property and the safety of homes and individuals. The interstate-commerce law, a penal statute, is a political statute. The employers' liability law, a penal statute, is a political one. I mean in its nature. The Government can afford to lose sometimes when it may perhaps think it should win, rather than to take the chances of depriving of his rights a defendant who, under these acts, is generally the agent of some other person, acting under instructions, under fixed rules, rules prescribing his conduct and defining his duties, which he obeys or observes at the risk of his employment.

Mr. President, with those amendments or others that accomplish the same purpose I could give my vote and support to the bill. Without them I shall be compelled to vote against it.

Mr. NELSON. Mr. President, I do not intend to take up much of the time of the Senate in the discussion of the bill. Its merits have been ably presented both by the Senator from Pennsylvania [Mr. KNOX] and the Senator from Colorado [Mr. PATTERSON]. I think the Senator from Maryland [Mr. RAYNER]

was subject to some confusion of ideas as to the question of jeopardy. I think if we examine the decisions of our courts on that subject they lay down a rule that is certainly decisive of this case.

The Constitution provides that no man shall be put in jeopardy a second time for the same offense. If a man has been in jeopardy he can not be reindicted. If on first indictment the indictment is quashed, or the indictment is held bad on a demurrer or a motion in arrest of judgment, in all those cases, according to all the authorities, he can be reindicted. His case can be sent to another grand jury and he can be indicted again and tried. He could not thus be reindicted and retried if on the first trial he had been in jeopardy. I read from Wharton's Criminal Pleading and Practice, and it states the law correctly, for I have examined the authorities:

A conviction under a defective indictment is no bar, unless the conviction has been followed by judgment and execution of the sentence. Hence, after judgment has been arrested or reversed on a defective indictment, or after an indictment has been quashed, or a judgment for the defendant has been entered on demurrer, a new indictment may be found correcting the defects in the prior indictment, and to the second indictment the proceedings under the first are no bar.

Numerous authorities are cited in this connection, and if this is good law, and I think no one can question it, in none of these cases has the defendant been put in jeopardy under the constitutional provision, because if he had been in jeopardy under the first indictment he could not be reindicted and tried on the second indictment.

To the same effect is a text-book on the Law of Crimes and Criminal Procedure, by Mr. Hochheimer, of the Baltimore bar. He lays down the same doctrine—

That after indictment is quashed a new one may be preferred, and refusal to quash does not preclude demurrer or motion in arrest

* * * * * * *

Judgment for the defendant upon demurrer is that he be dismissed and discharged from the premises, leaving him liable to be reindicted.

In section 338 the author cites several cases and says:

If judgment is arrested for insufficiency of the indictment, the proceedings are set aside, but the party may be reindicted; if it is arrested because the verdict is wrong, the verdict is set aside and a new trial ordered on the indictment.

The arrest of judgment in this case, on which an appeal lies, is not a general motion covering all the grounds on which a judgment may be arrested. It is simply for arrest of judgment because of the insufficiency of the indictment—that is, the failure of the indictment to charge a criminal offense.

I was a little surprised the other day to see the junior Senator from Maryland [Mr. WHYTE] offer the amendments to the bill striking out the provisions in it relating to an appeal from a decision or judgment quashing an indictment, and from a decision or judgment sustaining a demurrer to an indictment, and from a decision arresting a judgment or conviction for insufficiency of indictment.

I find on looking in the decisions of the State of Maryland those cases in which demurrers have been allowed. I take the case of the State of Maryland *v.* William Sutton, found in Gill's Reports, volume 4, on page 494. I have already referred to it. There the defendant was indicted on an indictment containing two counts—one count charging him with rape, the other count charging him with an assault to commit rape. The jury found him guilty on the second count, and a motion was made in arrest of judgment and the motion sustained. The State of Maryland—not the defendant, but the State of Maryland—took a writ of error to the supreme court, and the supreme court of Maryland held that the motion in arrest of judgment should not have been granted, and directed the case to be sent back to the lower court for further proceedings; in other words, it directed the case to be sent back for a new trial or a new indictment, as the case might be.

I find another Maryland case which was a criminal case. It is the State of Maryland *v.* Patrick McNally, found in 55 Maryland Reports, on page 559. In this case the defendant was indicted in the court below for stealing some wheat. A motion to quash the indictment was granted and the State took a writ of error. After reciting the case, stating the indictment and stating what proceedings were had upon it and that a motion was made to quash it, the decision adds.

And thereupon the attorney for the State, desiring to have the record removed to this court as upon writ of error, filed a petition in the name of the State, designating the questions of law by the decision of which the State was aggrieved, namely, the quashing of the indictment.

The court, after discussing the case, finally concluded as follows:

Being of opinion that this is the correct doctrine—

That is, as to the validity of the indictment—

and it appearing that the ruling of the circuit court in this case was clearly erroneous, its order and judgment quashing the indictment will be reversed and the cause will be remanded, to the end that the defendants may be required to plead to the indictment and the trial be proceeded with according to law.

I find another case in 48 Maryland, the case of Kearney *v.* The State of Maryland, 48 Maryland, page 16. There a demurrer was sustained to an indictment because it did not charge a criminal offense. The court in deciding that case concluded as follows:

The demurrer must therefore be sustained and the judgment reversed. But this reversal does not relieve the party from further liability. Not having been tried on a valid indictment, he has not been put in jeopardy, and may, on being discharged from his present imprisonment, be rearrested, reindicted, and tried again.

All these decisions and authorities that I have quoted go to show that the proper criterion in all these cases as to whether the defendant has been put in jeopardy or not is whether, if in any form before there has been a trial and a verdict the indictment is held defective and bad because it does not charge a criminal offense, the defendant can be reindicted, rearrested, and tried over again.

That could not be done under the Federal Constitution nor under the constitutions of the various States, which are alike on that subject, if the defendant had been in jeopardy. It is because the courts held that he was not in jeopardy on the first indictment that he could be rearrested and reindicted and tried over again. So we need not have any difficulty about the question whether a man has been put in jeopardy, because this amendment of the Senate committee to the House bill limits it exactly to all those cases, except in one instance, where the defendant can be reindicted, rearrested, and retried for the same offense.

As to the fourth ground contained in the bill, there we have provided, and expressly provided, that where the defendant has been in jeopardy he can not be tried over again.

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

So in that matter, out of extreme caution and to put it exactly in harmony and in line with the provisions of the three preceding paragraphs, we have expressly provided that where the defendant has been put in jeopardy he can not be reindicted.

The Supreme Court of the United States has covered this ground pretty well in two or three important cases. Take the case of The United States *v.* Ball, a case where three defendants were indicted for murder committed in the Indian Territory. They were indicted and tried in the district of Texas, to which the Indian Territory was attached for judicial purposes. On the first trial one of the defendants was acquitted, and two of them were found guilty. The defendants who were found guilty moved an arrest of judgment on the ground, among others, that the indictment was too insufficient; that it did not properly charge a criminal offense. The case was taken up to the Supreme Court of the United States, and in 141 United States the court ordered the indictment, in its final decision, to be quashed and directed that the case be proceeded with further in the court below. The three defendants were afterwards reindicted. They were again tried, all three of them, as well the man who had been acquitted on the first and bad indictment as the two who had been found guilty.

When that case came to the Supreme Court of the United States, the Supreme Court held that the first indictment was bad and did not properly charge a criminal offense, and yet the one defendant who had been acquitted on that indictment could not be tried over again, he having been in jeopardy; but as to the other two defendants, they having moved an arrest of judgment and got the trial and proceedings reversed on their own motion, they were liable to be reindicted and retried, and they were properly convicted.

The same thing was held in one of the most recent cases that came to this court from the Philippine Islands, the case of Trono *v.* The United States. In that case the man had been convicted in the lower court. He took an appeal to the higher court. He was indicted for murder. He was convicted of an inferior offense, and he appealed to the supreme court of those islands, and the supreme court affirmed the conviction—that is, they found the defendant guilty, as he had been found in the court below, but they found him guilty of a higher offense. The court held there that, having taken an appeal to the supreme court of the Philippine Islands, it did not lie in his mouth to object to the proceedings, and under the procedure prevailing in the Philippine Islands where a case of that kind is appealed to a higher court upon the motion of the defendant the whole case is retried by the higher court.

In another case from the Philippine Islands where the government undertook to take an appeal—I refer to the Kepner case—the government undertook to take an appeal, and the

supreme court held that in that case the government had no right of appeal.

All the cases provided for in this bill—and they are strictly covered, and nothing more is covered—relate to cases where under the decisions of our courts the defendant has not been put in jeopardy. I conceive that in all those cases it is proper that the Government should have the right of appeal to the Supreme Court of the United States to settle the important questions involved.

To me it seems strange that a nisi prius judge in a distant part of the country shall take it upon himself to pronounce an enactment of Congress unconstitutional and void. There is no other country on the face of the earth that I know of where the courts of the country can veto legislation. In this country there is a double veto on our legislation. First, the President can veto a bill that we pass, and then after we have passed a law the courts can veto it. We can overcome the veto of the President, but under our system and our jurisprudence we can not overcome the veto of the courts.

Where it relates to an important subject that is of national concern, in which the welfare of all the people of the United States is involved, before an act of Congress should be pronounced unconstitutional we should have the opinion of the highest court of the land—the Supreme Court. In my opinion no other court ought to have the ultimate power to place a veto upon an act of Congress.

I have heard it said by the Senator from Maryland [Mr. RAYNER] and reiterated by the Senator from Idaho [Mr. HEYBURN] that this is a great innovation, that we have got along for one hundred years without any change in our criminal law. That is true; and we have got along a great many years without any changes or innovation in respect to many other important subjects. It is not until recent years that we found the necessity of passing the Sherman antitrust law. It was not until recent years that we found the necessity of passing a law to regulate interstate commerce and the transportation of interstate commerce. It is not until recent times that we found the necessity of passing a national pure-food law, providing for the inspection of the foods of the people. It is not until recently that we found the necessity of passing a national quarantine law. To all these laws the same objection might have been urged as has been urged by these Senators: "Oh, we have got along; we have sledded along all these years without this legislation; why should we have these innovations? Why not rest on the common law, which is big enough and broad enough for anything?"

Mr. President, the question in its broadest sense appeals to me in this shape: We as the representatives of the people of the United States have found it necessary to enact this most important legislation to which I have called your attention, and the question now before us is whether we will allow a nisi prius judge of an inferior court to render ineffective our efforts in this behalf to protect the American people against trusts and monopolies and other dangerous things; whether we will allow ourselves to be handicapped and crippled by the decision of an inferior nisi prius judge.

To my mind the decision of Judge Humphrey in Chicago regarding the meat inspection law cuts no figure at all. I desire to call the attention of Senators to the fact that under the amendment that the Judiciary Committee have tendered to the Senate an appeal could not have been taken in that case. In that case a jury was impaneled, and the question whether the defendants were entitled to immunity under the immunity law because they had furnished Mr. Garfield and the officials of his Bureau information was submitted to the jury, and the jury under instructions of the court found for the defendants. In that case the defendants under the Constitution had been in jeopardy and in that beef-trust case no appeal could lie.

A case may occur where a special plea in bar is interposed and the Government does not deny the fact pleaded in the special plea in bar, admits the truth of it, but says in its answer or demurrer to the plea in bar that it constitutes no bar. In that case, where a plea in bar is decided without the intervention of a jury, there has been no jeopardy; and if the decision on the plea in bar is against the defendant or in favor of the defendant, where the defendant has not been in jeopardy, he should have the right of appeal. We expressly provide in the fourth paragraph that in the case of a special plea in bar where the defendant has been put in jeopardy no appeal lies.

The Senator from Maryland referred to the matter of a bill of exceptions. A bill of exceptions is simply to preserve the record of the proceedings in the lower court. It is simply an official record of the proceedings taken in the court below, and they go up with the pleadings, with the indictment and the demurrer to it, and the decision of the court. It shows what the court did in the premises. It simply puts it in a legal and technical form before the court. That is all there is in a bill of exceptions. I take it that in a case of a demurrer, where there is a broad demurrer and simply a decision of the court upon that demurrer, no bill of exceptions is necessary.

But this provides that in any of these cases where a bill of exceptions is necessary in order to bring an authenticated record before the court as to the proceedings that took place in the court below, the Government can have a bill of exceptions. It is necessary to include that in the bill, because under the authorities and decisions of the United States court the United States is not entitled to a bill of exceptions in criminal cases. Therefore that provision was put into this bill. It can do nobody any harm. It is simply to perfect the record, so that when the writ of error is brought for consideration in the appellate court it can have the whole record before it in an authenticated form.

I may be all wrong about it, but it seems to me that all Senators who have at heart the enforcement of the great body of remedial legislation that we have passed in recent years ought to be actuated by the desire to make that legislation effective and not to permit some inferior nisi prius court to put a veto on our efforts to protect the American people.

I have no pride about this matter. When this bill came over from the House it seemed to me that the provision of the bill was too broad, and that there was no meaning in taking an appeal where the verdict of the jury could not be set aside, where you could not disturb it. So when the bill was referred to a subcommittee I took pains to look up all the authorities on this question that I could find, and I aimed to put the bill in such a form that it would cover exactly those cases in which the defendant had not been put in jeopardy under the Constitution of the United States. I believe that the bill is limited strictly to that matter. As to the rest, while I have no doubt about the constitutional authority of every provision of the bill, it is simply a question of policy, a question whether we will allow inferior courts in many instances to render this great body of remedial legislation that we have been compelled to pass in recent years to be noneffective and allow these inferior courts to veto a legislative act.

Mr. WHYTE. Mr. President, it seems to be almost a travesty for anyone to discuss so important and serious a question as this to empty benches. Nevertheless, as I stated the other day, when the bill was about passing without opposition, it is too important a matter to pass without consideration; that it is a startling innovation upon the Federal practice in criminal cases for the last hundred years.

I was not in error when I looked upon it in that light, for those Senators who are familiar by practice in the Federal courts with the views of the highest of those tribunals will know that not long since the question came up in the Supreme Court, and it was argued that under the Evarts Act, the act creating the circuit court of appeals between the lower courts and the Supreme Court of the United States, the court of appeals decided against it, and it was an innovation so serious that the language of the legislature should be so expressed that he who runs may read and understand.

In the case of the United States *v.* Sanges, in 144 United States Reports, 310, the Supreme Court, remarking upon that clause in the law giving a right of a writ of error in the case of conviction of a capital crime, said that the Supreme Court can not review by writ of error a judgment of acquital, except, possibly, when a constitutional, jurisdictional, or treaty question is involved. Under the statute they have a right under the writ of error to consider such a case; but except in these extreme cases, where a high question of constitutional law or that which goes to the jurisdiction of the court or in regard to a treaty, the Supreme Court of the United States could not review a case where there had been a judgment of acquittal.

Again, in answer to this attempt on the part of the counsel to get the court to interfere under that act of 1891, the Supreme Court said:

> It is impossible to presume the intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States.

That can be found on page 323 of 144 United States Reports.

Under that law of 1891 it can be seen that by section 5 appeals or writs of error may be taken from the district court, or from the existing circuit court of the United States, direct to the Supreme Court in the following cases:

> In any case in which the jurisdiction of the court is in issue. In such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.
>
> From the final sentences and decrees in prize causes.
>
> In cases of conviction of a capital or otherwise infamous crime.
>
> In any case that involves the construction or application of the Constitution of the United States, etc.

When the case of De Lemos *v.* The United States came up before the circuit court of appeals—and it is reported in 46 Circuit Court of Appeals Cases, 196—the court there laid down the distinction which seems to me to be lost sight of in the bill now under consideration. The court there said:

> The writ of error and the appeal are the two principal methods known to English jurisprudence and to the jurisprudence of the Federal courts by which cases may be removed from an inferior court to an appellate court for review.

In the bill now under consideration, which it is proposed to enact into law, the terms "writ of error" and "appeal" seem to be used as though they were synonymous instead of being entirely different. Bills of exception are spoken of as if they did not have reference to appeals when they are made applicable, under the bill, to writs of error, and consequently in the confusion which is to be found in this proposed law is the great danger I apprehend in ever having it administered by a court of valid jurisdiction.

The appeal, says the court, brings up the whole case on its merits on the ruling of the court in regard to the admission of testimony or the rejection of testimony, and the various other questions that may arise during the pendency of the trial. That is the appeal, that is the bill of exceptions by which the appeal is taken—entirely different from any proceeding by writ by which a jurisdictional question or a constitutional question can be decided. It was for that reason that I suggested the other day that in these cases the writ of error was to be issued and its service was to be applied solely to jurisdictional or constitutional questions; but you will see, Mr. President, upon examining this bill, that you can not tell where the limitation comes in with regard to the right of the United States to persecute, instead of prosecute, the party charged with crime. In the first part of the bill you will see that it speaks of the writ of error which is to be issued:

> That a writ of error may be taken by and on behalf of the United States from the district or circuit courts to the Supreme Court or the circuit courts of appeals, as prescribed in an act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, and the acts amendatory thereof, in all criminal cases.

But farther on it provides:

> In all these instances—

For instance, after a motion in arrest of judgment on conviction for insufficiency of indictment—

> In all these instances the United States shall be entitled to a bill of exceptions as in civil cases.

What do they want with a bill of exceptions when they have a writ of error carrying the jurisdictional or constitutional question from the lower to the higher court? If I had not too great respect for the Judiciary Committee, I would say it was a legal trap. Then what does the appeal do? Says the United States circuit court of appeals:

> The appeal brings up the whole case for reexamination on the merits as to both law and facts, and for decision as if no decree had been ever entered.

But this bill says "As in civil cases." The court further says:

> A writ of error was the only appropriate remedy at common law by which a case could be brought up for review by a superior court having jurisdiction.

In the case of Cohens *v.* Virginia (6 Wheat., 409) the writ of error is described and shown to be confined entirely to rulings on points of law, and the distinction is fundamental, and yet under this bill a bill of exceptions and an appeal are made precisely similar to a writ of error, in conflict with the understanding of all the practice in the Federal court from the time that court was established under the Constitution of the United States.

I do not want to take up too much time of the Senate by going into details, but I will say, in passing, that it was for that reason I proposed the other day to limit the writ of error in its operation to matters of law coming up before the jury impaneled to try the party. Then you have got no question of jeopardy. There is no difficulty in raising a jurisdictional or a constitutional question by a demurrer to the indictment, and I suggested the form and substance of a simple amendment to the latter part of this bill, where the objections to be taken are described, and they are limited to four, and compel the man under trial to make his constitutional objection on a demurrer at the time he is called to the bar to plead. He is in jeopardy after he has pleaded, after issue has been joined on the part of the Government, after the jury is sworn, and all the preliminaries are completed for trial. It is not that he is put in jeopardy by conviction or by acquittal under peculiar circumstances in the case of certain penalties. He is put in jeopardy when he is required to be put to a second trial. That is the time when he is in jeopardy, and the Supreme Court has said so.

The Constitution—which is nothing in reality in the part to which I have referred but the embodiment of the common law—the Constitution in that humanity which, thank God, exists among us all, that humanity to protect the unfortunate when they are accused of crime by the presumption of innocence, which begins from the very moment the charge is made against him at law until the last moment when the trial is brought to an end—that same humanity provided that he should not be put to trial a second time, and thus his life or limb be put in jeopardy. Our fathers, when they inserted this amendment in the Constitution, embodied only that principle which we have inherited from those upon the other side of the great ocean. These are the words:

> No fact tried by jury shall be otherwise examined in any court of the United States than according to the rules of the common law.

Then follows the protection which is given to the individual, that he shall not be put in jeopardy of life or limb. Then the act of 1897, following the act creating the circuit court of appeals, came up for judgment in the case of Bucklin *v.* The United States (159 U. S., 680), in which the court said this:

> The final judgment of a court of the United States of the conviction of a capital offense or other infamous crime is not reviewable here except on writ of error. Our review of the judgment when brought here in that form is confined to questions of law properly by a bill of exceptions as arising upon the record.

Not a bill of exceptions, as in criminal cases, but a bill of exceptions as arising on the record, and then only the question which is shown to have occurred in the trial upon the face of the record, and not upon the facts.

Again, in the same case, the court said:

> Under the act as amended (January 20, 1897) it is not denied that capital cases can only be reviewed by the Supreme Court on writ of error. It is conceded and is clear that other criminal cases, not infamous, can be reviewed only by writ of error in the circuit court of appeals.

Here is a bill opening the door wide to try a man over again through a bill of exceptions arising upon the merits and the facts of the case.

> A proper construction of the act does not allow an appeal to this court—

There is the distinction the circuit court of appeals makes between a writ of error taking up a purely legal question and an appeal which opens wide the door to an examination of the case entirely, as it would be tried in the upper court de novo—

> A proper construction of the act does not allow an appeal to this court from a judgment of a circuit court convicting a defendant of an infamous crime.

Now, on the question of jeopardy I shall detain the Senate but a few moments. The language of the fifth amendment of the Constitution relating to jeopardy is:

> Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

In Commonwealth *v.* Fitzpatrick, which I find in 1 Law Reports Annotated, 451, the jury had been dismissed in disregard of the protest of the defendants, and when they were again put on trial the court said they had the right under the Constitution to say: "We have been once put in jeopardy for the crime, and we can not be compelled to undergo the same peril a second time for the same offense." This was the effect of their special plea, and it was unanswerable.

The case I cited—and I am sorry that my friend the Senator from Pennsylvania [Mr. KNOX] is not here—is from 15 Pennsylvania, page 466, Pieffer *v.* Commonwealth.

Again, withdrawing a criminal prosecution from a jury which had been charged with the trial of a prisoner, and dismissing the jury merely because a witness was absent, operates as an acquittal, and the prisoner can not again be placed on trial, under the constitutional provision that no person shall be for the same offense subject to be twice put in jeopardy of his life or liberty. That was decided by the South Carolina supreme court in the case of South Carolina *v.* Richardson (47 S. C. Rept., 166).

It is only the common-law maxim embodied in the Constitution, as I stated, founded in the humanity of the law and in a jealous watchfulness over the rights of the citizens when brought in unequal contest with the State.

That I quote from the opinion in the case of State *v.* Jones (7 Geo., 422), cited by my colleague from Maryland [Mr. RAYNER] this morning. The same principle is found in the case of United States *v.* Sanges (144 U. S.).

Again:

> At common law the protection from second jeopardy for the same offense clearly included immunity from second prosecution when the court having jurisdiction had acquitted the defendant of the offense; and it is the settled law of this court—

Says the Supreme Court of the United States, from which I quote—

and it is the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict, and it was found upon a defective indictment.

That is the case of Kepner *v.* United States (195 U. S.).

The Senator from Minnesota [Mr. NELSON] has cited my own State. My own State has had the right of writ of error on jurisdictional questions ever since it was a State. It does not stand upon the statutes. But it had no greater right. It never had any right of appeal until the act of 1872. In the case referred to by the Senator from Minnesota and in the other cases afterwards referred to by him the right to claim by special plea in bar former jeopardy was waived by the defendants where they were convicted and where they themselves appealed. And so it is the same law in Maryland.

I am not, as the Senator from Wisconsin [Mr. SPOONER] will remember, interposing any objection to an appeal and to a writ of error issued in a case where prior to the impaneling of the jury, on a demurrer raising jurisdictional or constitutional questions, the United States shall have the right of appeal, but it is against the bill which is about to be enacted that I enter a protest.

I do so not as a child at the bar. I practiced in my first career as a lawyer as the assistant of the attorney-general of my State in prosecuting in Maryland; afterwards, on the other side of the table, defending persons charged with crime, and subsequently as attorney-general of my State. I was the governor who signed the Maryland law in 1872 in regard to giving the State the right of appeal in certain cases. So that I say to the Senator from Minnesota that every case he cited tends to prove our theory that the moment a man has pleaded to the indictment and not demurred; the moment he has raised an issue with the State and the State accepts the issue and the jury is impaneled he is in jeopardy from that time until the verdict of acquittal by the jury is rendered.

Mr. President, while I am most earnestly opposed to the bill, I am ready to yield that far. It would have made the case that happened out in the West—the case decided by Judge Humphrey—impossible. An appeal would have been taken at that time originally, and the question of immunity could not have been raised afterwards if the clause that is in this bill had been in the law then, that objections of a constitutional or jurisdictional character must be made before the jury is sworn. There would have been no trouble, for the defendants would have been compelled to have raised the question upon demurrer.

Mr. President, I felt it my duty to make my protest to add to what my vote will indicate when this bill comes up for final action.

Mr. SPOONER. Mr. President, only a few words on this bill. It is absolutely unnecessary, after the remarks which have been submitted in favor of it by the Senator from Minnesota [Mr. NELSON], the Senator from Pennsylvania [Mr. KNOX], the Senator from Colorado [Mr. PATTERSON], and other Senators who favor it, to go in any detail into the discussion of it.

I have listened with great interest to the argument of the Senator from Maryland [Mr. WHYTE] who has just taken his seat. It was the argument of a lawyer of great ability and very large and long experience. He is not opposed to the presentation by writ of error by the Government to the Supreme Court in criminal cases within defined limits of questions of law. He is much more discriminating, I think, in his opposition to this bill than my distinguished friend, his colleague [Mr. RAYNER], impressed me as being.

Mr. President, I have never been much alarmed or had any sympathy whatever with the criticism which is made of our judicial system so far as it involves the decision by nisi prius judges of constitutional questions. Some of the ablest judges who have ever sat upon the Supreme Bench won their reputation as jurists in the district and circuit courts of the United States. One or two of those now upon the Supreme Bench achieved great fame sitting at the circuit as circuit judges. I have known, and so has every Senator here known, some very able lawyers upon the district bench of the United States. They take the same oath of office that the Supreme Court judges do and that the judges of the circuit courts do, and if a district judge of the United States in a case properly before him involving a constitutional question has a conviction that the law before him is unconstitutional, he would be a coward and unfit to sit upon the bench if he did not so declare.

Mr. President, I did not discover, if I may be permitted to say so, weight in the opposition made by the Senator from Maryland [Mr. RAYNER] who first spoke to this bill, upon the ground of the conflicting decisions of the various courts in the United States as to jeopardy and what constitutes it. The courts in the various States have differed about it, but the decisions of the Supreme Court of the United States as to what constitutes "jeopardy" within the meaning of the Constitution will be binding upon every district and circuit judge in the United States, without any regard whatever to differences of the State courts upon the subject of the legal meaning of the word "jeopardy."

The Senator from Maryland spoke of the pending bill as a step toward centralization and the enlargement of Federal power. I am too obtuse, Mr. President, to be able to discover anything whatever in the proposition before the Senate involving enlargement of Federal power, using the phrase in its proper sense, or tending to centralization in the Government. It simply deals with the practice in the courts of the United States. It is not intended to affect the substantial right of any defendant who has been indicted in any of the courts of the United States. It does not enlarge Federal power. It really regulates the practice and the procedure. No defendant has any vested right, nor has any citizen, in mere matters of procedure, nor has any defendant a right per se to object to an appeal by the Government in certain cases. To my apprehension there is no constitutional question involved in this measure. It is not possible for the Congress, by any valid act, to subject a person for the same offense to be twice in jeopardy of life or limb. That is impossible.

It is in the Constitution. It is fundamental. No person in the United States I suppose would for a moment, if he could, depart from it, so elemental is its justice, and the Congress can not, if it would; and if the court should feel obliged to construe anything in this bill as violating that provision of the Constitution, which I think it could not possibly do, it would be clearly a void act, and the court would give it a construction which would render it valid, not one which would render it void. Jeopardy is not involved in it at all, as the Committee on the Judiciary thought and as I think has been very clearly shown here to-day by the Senator from Pennsylvania [Mr. KNOX] and others, by argument which I do not intend to repeat.

It is an "innovation." Everything that changes an existing system or practice is an innovation. The circuit court of appeals legislation was an innovation. The prosecution by information for a large class of offenses in the Federal courts was an innovation. It does not follow, as it seems to be thought by some Senators here, that because for a hundred years there has been no change in the matters covered by this bill there is no need for it. There have been changes in nearly all of the States in regard to the criminal practice. The people of a large number of States became satisfied, some of them a long time ago, others at later dates, that the old system which denied the State the right of appeal in criminal cases, within certain limits, was absolutely unjust to the people. The old law, it has been thought, gave too many technical advantages and grounds for indefinite delay to the defendant in criminal cases.

In many of the States the criminal laws have been changed so as to simplify them, not depriving the defendant of any substantial right at all, but facilitating and hastening the disposition of criminal causes. In my State they have provided for trial by information. They have made informations amendable. In many States, and notably in some of the Southern States, as shown by the report made with great industry by the Senator from Minnesota [Mr. NELSON], public opinion demanded a change in the ancient rules so that there may be an appeal in certain cases and upon certain questions, and it is interesting to note that in nearly all those cases appeals have been given as they are proposed to be given in this bill.

It is not the function of the Government to confine its interest solely to the defendant in criminal cases. The rights of the defendant must be religiously safeguarded. Of course that goes without saying. But, subject to that, the legislature has a right—and not only a right, but it is its duty—to look to the interests of the great body of the people. That is what has been done in the States. That is what within narrow limits is proposed to be done by this bill, and would be done, I think, if the word "appeal" and these lines about a bill of exceptions were stricken out.

Take Alabama. In Alabama they provide that—

In all criminal cases where the act of the legislature under which the indictment or information is preferred is held to be unconstitutional the solicitor may take an appeal in behalf of the State to the supreme court, which appeal shall be certified as other appeals in criminal cases.

In Arkansas they have a provision very carefully guarded:

If the attorney-general on inspecting the record is satisfied that error has been committed to the prejudice of the State, and upon which it is important to the correct and uniform administration of the criminal law that the supreme court shall decide, he may, by lodging the transcript in the clerk's office of the supreme court within sixty days after

the decision, take the appeal; but a judgment in favor of the defendant *which operates as a bar to a future prosecution of the offense* shall not be reversed by the supreme court.

Of course not, but that language which operates as a bar to a future prosecution of the offense is significant language. I do not know how it has been construed by the supreme court of Arkansas, if it has been construed at all, but it is well used.

Mr. BERRY. If the Senator from Wisconsin will permit me, I understand it applies where the party has been in jeopardy on a valid indictment.

Mr. SPOONER. Certainly.

Mr. BERRY. The Supreme Court says that jeopardy attaches when the jury is sworn.

Mr. SPOONER. Yes.

Mr. BERRY. I think that is it.

Mr. SPOONER. That is right. I will not read all of this report. When Senators talk about public opinion and about everything being well enough as it has been for a hundred years, I simply call attention to the fact that the people of many of the States have found it a necessary reform in criminal procedure to incorporate in their statutes provisions almost identical with those that are proposed here as to the United States in certain cases.

CALIFORNIA.

An appeal may be taken by the people: (1) From an order setting aside the indictment or information; (2) from a judgment for the defendant on a demurrer to the indictment, accusation, or information; (3) from an order granting a new trial; (4) from an order arresting judgment, and (5) from an order made after judgment, affecting the substantial rights of the people.

The statute of the State of California goes much further than is proposed by this bill, and further than I, for one, should be satisfied to go.

Connecticut has broad provisions on the same subject. Idaho has a provision very much like the provision in this bill:

An appeal may be taken by the State: (1) From a judgment for the defendant on a demurrer to the indictment or information; (2) from an order granting a new trial; (3) from an order arresting judgment, and (4) from any order made after judgment affecting the substantial rights of the prosecution.

The Indiana provision is very much like this bill.

Appeals to the supreme court may be taken by the State in the following cases, and no other: (1) Upon a judgment for the defendant on quashing or setting aside an indictment or information; (2) upon an order of the court arresting the judgment; (3) upon a question reserved by the State.

That is their reform of the criminal procedure in respect to the matters which we are here considering. In Iowa—

Either the defendant or the State may take an appeal. But in appeals by the State the supreme court can not reverse the judgment or modify it so as to increase the punishment.

A limitation which would be entirely unsatisfactory in its scope to me.

Kansas has the same as Idaho. Kentucky has a provision for appeal by the State in criminal cases. Mississippi has one which is very well drawn and quite as broad as that proposed here. Missouri has one—

An appeal is allowed to the State in any criminal prosecution when an indictment has been held insufficient on motion to quash, demurrer, or motion in arrest.

And so Montana has one like the one proposed here, and Nebraska and Nevada. New York, a very progressive State——

Mr. RAYNER. Will the Senator allow me?

The VICE-PRESIDENT. Does the Senator from Wisconsin yield to the Senator from Maryland?

Mr. SPOONER. Certainly.

Mr. RAYNER. If you will take the Nebraska or the Nevada law, I would be perfectly satisfied with it. Just look at the Nebraska and the Nevada laws. Both have the provision I have asked for in this amendment.

Mr. SPOONER. I will get to the provision the Senator asks for, which I do not think ought to be in the bill.

Mr. RAYNER. Yes, but I want to call the attention of the Senator, when he is citing Nebraska and Nevada as having laws of this sort, to the fact that Nebraska and Nevada have qualified them with provisions substantially similar to the amendment I have offered.

Mr. SPOONER. With respect to future operation. That is true. They provide, in Nevada, that it shall not operate to affect a judgment in favor of the defendant.

Mr. RAYNER. Look at Nebraska.

Mr. SPOONER. It is too long. I will not take time to read it. In New York the provision is:

An appeal to the supreme court may be taken by the people in the following cases and no other: (1) Upon a judgment for the defendant, on a demurrer to the indictment, and (2) upon an order of the court arresting the judgment.

The last is the only item in the bill which has given me any trouble. They have it in several of the States. I might take the time further. They have it in North Dakota. North Carolina has a provision including arrest of judgment and everything else, as I now recall it, in this bill. Oregon has one which extends also to motions granted arresting the judgment. In Tennessee either party may appeal. South Carolina provides:

The State may appeal from a judgment granting a motion to quash an indictment.

In Utah an appeal may be taken by the State. In Wisconsin we do not allow appeals in criminal cases.

Mr. President, that is a pretty fair indication as to what the people of many of the States have in the tide of time found to be necessary by way of reforming the criminal procedure. Of course it needs no argument to show that what is due to the great body of people, represented by the Government in these cases in the States is due to the great body of the people of the United States represented by the Government in its prosecutions.

The amendment proposed by the Senator from Maryland [Mr. RAYNER], as I understand it, is an absolute change in the law. It changes the rule as to jeopardy. The Senator said after a man had been once tried he did not want him tried again, jeopardy or no jeopardy. That is going very much further than the States have gone and very much further, so far as I remember, than anyone here has proposed to go.

The Supreme Court of the United States, in the case to which the Senator from Minnesota called attention, made a very interesting decision on the question of jeopardy. They overruled the English rule as laid down in the books which we who have practiced the criminal law have been accustomed to take as standard. The court in its unanimous opinion says:

In England an acquittal upon an indictment so defective that if it had been objected to at the trial or by motion in arrest of judgment or by writ of error it would not have supported any conviction or sentence has generally been considered as insufficient to support a plea of former acquittal. (2 Hale, P. C., 248, 394; 2 Hawk., P. C., c. 35, sec. 8; 1 Stark. Crim. Pl. (2d ed), 320; 1 Chit. Crim. Law, 458; Archb. Crim. Pl. & Ev. (19th ed.), 143; 1 Russell on Crimes (6th ed.), 48.) And the general tendency of opinion in this country has been to the same effect. (3 Greenl. Ev., sec. 35; 1 Bishop's Crim. Law, sec. 1021, and cases there cited.)

The court deals with that rule and is not satisfied that it was well sustained by the English authorities. I will not take the time to go into it. But they cite as the leading American case on the subject, which they adopt, the case of The People *v.* Barrett (1 Johns, N. Y.). They also cite with approval the case of The Commonwealth *v.* Purchase (2 Pick.), in which Chief Justice Parker delivered the opinion of the court. I will not take time to read it. They cite the Massachusetts statute——

Mr. RAYNER. I should like to ask the Senator from Wisconsin a question.

The VICE-PRESIDENT. Does the Senator from Wisconsin yield to the Senator from Maryland?

Mr. SPOONER. Certainly.

Mr. RAYNER. Why does he object to this amendment? If it is surplusage, it certainly is not objectionable. If the substance of the amendment is already in the bill, that is no objection to it. Why object to it when, with respect to the District of Columbia, Congress has passed a law identical, word for word, with the language of this amendment:

Provided, That if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside.

If it is good in the District of Columbia, why is it not good all over the United States? What is the objection to it?

Mr. SPOONER. Has it ever been passed upon by the Supreme Court?

Mr. RAYNER. I am satisfied the Senator from Wisconsin would not claim that this amendment is unconstitutional.

Mr. SPOONER. Which amendment?

Mr. RAYNER. The one I have offered and the one I have just read.

Mr. SPOONER. I think the one the Senator has just read, unless the Supreme Court has passed upon it, about which I do not know, would very likely be held by the Supreme Court to be calling upon them to exercise no judicial function. In other words, as presenting to the court and inviting decision by the court upon a purely moot question; and I am inclined to think that under the doctrine laid down by the Supreme Court in the case of Gordon, in which the opinion was by Taney, C. J., who died before it was announced, and which the court adopted (I do not remember the volume), and in the decision made by the court affirming Ex parte Sanborn afterwards, and numerous other cases, the Supreme Court of the United States would say that it is a purely moot question.

Mr. RAYNER. Will the Senator allow me?

Mr. SPOONER. Certainly.

Mr. RAYNER. Suppose they did say that? No one would

be hurt by it. Then they would determine whether or not the prisoner had been in jeopardy. This measure, I understand, was considered by some of the ablest lawyers in both the Senate and the House, and if the Senator from Wisconsin will permit me, it does not, as I am trying to show, undertake to define what jeopardy is.

Mr. SPOONER. No; and that is one——

Mr. RAYNER. Just a moment.

Mr. SPOONER. Let me have the amendment.

Mr. RAYNER. It does not undertake to define what jeopardy is or is not, because, as I tried to show, there are a number of cases that might not be legal jeopardy. The amendment does not involve the plea of autrefois convict or autrefois acquit.

Mr. SPOONER. No.

Mr. RAYNER. It simply says that if a man has been indicted once and tried, he shall not be tried again. It is entirely outside the question of jeopardy. If the Supreme Court pronounces it unconstitutional, then it certainly does not hurt anybody; and if it is all right, it may be necessary; and if it is mere surplusage, it can not hurt anybody.

I have not heard from the Senator from Pennsylvania [Mr. KNOX] or the Senator from Wisconsin [Mr. SPOONER] or the Senator from Minnesota [Mr. NELSON] in all this argument a single objection to the amendment that I have offered.

Mr. SPOONER. I have this objection to the amendment which the Senator has offered: If it means anything it means too much.

Mr. RAYNER. That is an objection——

Mr. SPOONER. If it does not mean anything, it is not very dignified or wise legislation to incorporate in an important act of Congress.

Mr. RAYNER. I will modify it in any way the Senator can suggest to give it additional dignity.

Mr. SPOONER. I am not speaking of its apparel. I am speaking of the substance. It is the body that ought not to be projected here. It is not the clothing. There is nothing that can interfere with jeopardy——

Mr. NEWLANDS. Mr. President——

The VICE-PRESIDENT. Does the Senator from Wisconsin yield to the Senator from Nevada?

Mr. SPOONER. Certainly.

Mr. NEWLANDS. I will ask the Senator from Wisconsin whether the chief purpose of this proposed act is not so much to secure the conviction of a defendant as to secure uniformity of construction as to the validity of statutes of Congress. Assuming that the amendment proposed by the Senator from Maryland does present simply a moot question, I will ask him whether he can not suggest some method by which the decision of the Supreme Court can be obtained upon these questions without tying up the defendant and subjecting him to all the law's delays resulting from tedious appeals?

Mr. SPOONER. I think there was great merit in the amendment offered by the Senator from Nevada [Mr. NEWLANDS], which was voted down by substituting for it the Peter amendment.

Mr. NEWLANDS. But that simply released the defendant on his own recognizance.

Mr. SPOONER. Yes.

Mr. NEWLANDS. And pending the appeal he would be under constant anxiety with reference to the result of a case which might take months and possibly years to determine. It seems to me the humanity of the law requires that the defendant should not only not be put in jeopardy twice, but that he should have a speedy trial. He should not be kept hanging by the eyelids while these legal questions are being determined.

Mr. SPOONER. He can not be put in jeopardy twice. Such "anxiety" can not well be avoided in all cases. A defendant against public justice has no right to be protected against this anxiety.

Mr. NEWLANDS. He can not be.

Mr. SPOONER. No.

Mr. NEWLANDS. I understand that; but I understand the purpose of the law also is to give, and that the humanity of the law demands that there shall be given, a speedy determination and out of that humanity thus far appeals have not been given in criminal cases as against the defendant. Nor did appeals exist at the common law, as I understand.

Now we propose to change all that, and the change necessarily keeps the defendant hanging by the eyelids for months and possibly years awaiting the determination of the court. It seems to me that if the purpose is simply to obtain uniform construction by the courts as to the constitutionality or validity of the acts we ought to find some means of doing it without tying up the defendant for an interminable time.

Mr. SPOONER. The method here proposed is the one adopted in a good many of the States.

Mr. NEWLANDS. I am not informed as to that. The Senator from Maryland referred to a number of States where the decision on appeal did not affect the defendant, where a judgment or a verdict releasing the defendant was not set aside upon a decision by the appellate tribunal unfavorable to him upon points of law.

Mr. RAYNER. There are twenty-three States which have declined to adopt it, and of those that have adopted it, half a dozen have put in the reservation, among them the State of the Senator from Nevada. So the large majority of the States either have not adopted this legislation, or they have put an amendment in it making it perfectly harmless, the way I have proposed to do here. I have not yet heard the slightest argument whatever on this floor against it—not a word.

Mr. SPOONER. I should like to have the Senator from Maryland point out to me what there is in this bill that can involve double jeopardy.

Mr. RAYNER. I do not know whether or not the Senator heard me when I discussed this question for about an hour.

Mr. SPOONER. I heard the Senator, but——

Mr. RAYNER. I am sorry. I did my best to make myself understood.

Mr. SPOONER. The Senator always does well.

Mr. RAYNER. I know. The Senator himself does well sometimes, too. I do not think he is doing quite as well on this matter as I have heard him do before.

Mr. SPOONER. I do not think the Senator ever thinks I do well when I disagree with him.

Mr. RAYNER. I think the Senator is doing as well as anyone else could. I think he is handling a bad case in the best possible way.

I admitted that there was no jeopardy in the cases I referred to. I have no right to define jeopardy. What right have we here to define jeopardy? We all have to agree upon the proposition that Congress can not define jeopardy. The Supreme Court must define it.

Mr. SPOONER. Yes.

Mr. RAYNER. I gave three instances, and there was no answer on the floor, although I asked for an answer, where a man was not in legal jeopardy but where he had been tried. A man may be tried without being put in legal jeopardy.

Mr. SPOONER. Yes.

Mr. RAYNER. And I wanted the amendment to cover those cases. There is no use of my repeating the cases. One of them was where the court mere motu had decided the law to be unconstitutional. Second, where the court had held that the law under which the prisoner was being tried had been repealed. Third, on a demurrer or a motion ne recipiatur to a plea of limitations, unless you put this amendment in the defendant can be tried again.

Mr. SPOONER. He can not if he has been in jeopardy.

Mr. RAYNER. The Supreme Court will say he has not been in legal jeopardy. I do not want that man tried again whether he has been in legal jeopardy or not.

Mr. SPOONER. I am glad the Senator puts it that way.

Mr. RAYNER. I put it that way before.

Mr. SPOONER. I was so unhappy as not to understand the Senator fully, although I think he did put it that way before. There are a vast number of cases in which if a man has been once tried and the court finds that he was not, for some reason, in legal jeopardy and that therefore under the Constitution of the United States he may be lawfully tried again, justice to the people, justice to decency, justice to the Government require that he shall be tried again.

Mr. RAYNER rose.

Mr. SPOONER. The Senator will permit me.

Mr. RAYNER. Oh, yes; I will not interrupt you.

Mr. SPOONER. Permit me. Take a case of piracy. Take a case of treason. Take the infamous case of rape. Take some cases of murder, cowardly, merciless, brutal as the human mind can conceive of, and on appeal to the Supreme Court of the United States the case is reversed, under a decision by the court that the defendant has not been in legal jeopardy. Why should he not be tried again?

Mr. RAYNER. I will answer that question.

Mr. President, that would be a complete answer to every objection that has been made to this proposed law, if the Senator did not forget to state that this amendment requires that there shall be a verdict for the defendant. This amendment says that in every case where there has been a verdict and a judgment for the defendant he shall not be tried again.

Mr. SPOONER. Mr. President——

Mr. RAYNER. One moment. I do not say that wherever a defendant is tried he shall not be tried again, for every one of us knows that where there is a motion in arrest of judgment he is always tried again, either on the same indictment or on another indictment. But I say where the defendant is acquitted, where there is a verdict of not guilty, where there is a judgment on it, that he shall go without day and be discharged, I do not care how great the crime, because the greatness of the crime never changes the principle, I say that man ought not to be tried again.

Mr. SPOONER. *There is nothing in this bill that reaches a verdict of not guilty.* There is nothing that touches that subject in any way on earth except one provision, and that is the motion made *by the defendant himself* where he has been found guilty, of course, to arrest the judgment.

Mr. RAYNER. Let us see if the Senator is correct. Let us see if he is not mistaken about that. Will the Senator let me have that report? Let me ask the Senator, because we want enlightenment on this subject. I have no feeling about it——

Mr. SPOONER. Nor I.

Mr. RAYNER. Not the slightest. It is a question of law.

Mr. SPOONER. Nobody can have any feeling about it.

Mr. RAYNER. I am perfectly willing to vote for a law that will give the Supreme Court of the United States the right to decide these questions, if you do not apply it to pending cases. I am perfectly willing to vote for a bill to give the Supreme Court the right to determine the constitutionality or the unconstitutionality of a law and to decide any point whatever of law or practice. I am perfectly willing to do that, when you save a man who has been tried from being tried again.

Now suppose the case I gave you this morning. At the end of the case, after the testimony is in, the court quashes the indictment upon the ground of its unconstitutionality. The court does it itself.

Mr. PATTERSON. That does not apply.

Mr. RAYNER. I beg your pardon. It does apply. I will show the Senator from Colorado that it applies to it, unless I misconceive the language of it. "From the decision or judgment quashing or setting aside an indictment." That does not say that the prisoner must file that motion. There is not a word in it about the defendant filing a motion. Can not the court render a decision or judgment or set aside the indictment of its own motion? It has done so over and over again in our State. I should like the Senator's opinion upon that point.

Mr. SPOONER. Is that jeopardy?

Mr. RAYNER. I say that is not jeopardy, and that the man ought never to be tried again. That is just the division between us. The man ought never to be tried after giving his testimony in that case.

Mr. SPOONER. As far as I am concerned I am not willing to lay down any rule of that kind in this country——

Mr. RAYNER. Then that is all right.

Mr. SPOONER. That no matter what the offense may be, no matter how vitally the public interest is involved in the administration of justice, in such a case where the Supreme Court finds that there has been no jeopardy we shall declare by law that the defendant shall not be again tried.

Mr. RAYNER. If the Senator from Wisconsin will permit another interruption, does he think the judgment should be reversed after the man has been arraigned, after he has plead to the indictment, after he has employed counsel and the testimony for the prosecution has gone in and his own testimony has gone in, so that the prosecution knows exactly what his case is? He is perfectly willing to go before the jury and take the chances of conviction or acquittal. It is not his fault. The court steps in and holds the law unconstitutional. The Senator thinks that a man ought to be tried over and over again, if the Supreme Court should reverse the judgment of the court below?

Mr. SPOONER. Yes; he may be tried over again.

Mr. RAYNER. Of course. Does the Senator think he ought to be tried over?

Mr. SPOONER. Yes; in many cases.

Mr. RAYNER. I say never, never. Not as long as there is any spirit of liberty in the land will I ever vote for anything of that sort. The prosecution knows every word of that man's testimony.

Mr. SPOONER. I see no good reason and the framers of the Constitution saw no good reason for it; there was not incorporated in the Constitution such a provision as the Senator contends for. What was placed in the Constitution was that no man for the same offense shall be twice put in jeopardy of life or limb. That is the constitutional rule. That is the rule under which we have administered the Government ever since it was ordained. The Senator from Maryland is not content with that rule, but he insists that independent of it, in all cases where a man has been tried even on his own motion and judgment or verdict of guilty has been arrested——

Mr. RAYNER. No; not arrested.

Mr. SPOONER. Yes; arrested.

Mr. RAYNER. Not arrested.

Mr. SPOONER. All this bill does——

The VICE-PRESIDENT. Does the Senator from Wisconsin yield further to the Senator from Maryland?

Mr. SPOONER. Yes.

Mr. RAYNER. I beg the Senator's pardon. I am not referring to arrest of judgment. When the judgment is arrested a man is always tried over. He can be tried under the old indictment or a new indictment. I am asking the Senator for information. I say that the man ought not to be tried again. The Senator from Wisconsin says that the man ought to be tried again. If he ought to be tried again, then the amendment ought to be defeated, and if he ought not to be tried again, the amendment ought to be adopted.

Let me ask the Senator this question: That man practically outside of this proposed law can not be tried again. You can not try a man over again for the simple reason that he would go before the same judge, in the same jurisdiction, and the judge has already decided the law to be unconstitutional. Practically it is impossible now to try that man over again, but by passing this law you give the court the right to try him over again.

Mr. SPOONER. If the court below had held the law unconstitutional and the Supreme Court had held the law constitutional. I suppose the nisi prius judge would probably by the time the case got back there have changed his mind.

Mr. RAYNER. But the Senator forgets that the Supreme Court has no power under existing law to pronounce the law constitutional, because you have no right of appeal. This law steps in for the first time and gives a right of appeal. If I can only impress that upon the mind of the Senator it may be that he will change his view.

Mr. SPOONER. That is perfectly understood, and that is one of the objects of this proposed law.

Mr. RAYNER. It opens the case against him.

Mr. SPOONER. The question is whether it subjects a man under any aspect of it to the danger of double jeopardy.

Mr. RAYNER. Does it not do it in that case practically?

Mr. SPOONER. The Senator says he does not care whether it is double jeopardy or not. Even if a man under the Constitution may properly and lawfully be put on trial again, if he has been tried once, even though it were a mistrial, if he had been for a moment in jeopardy, he insists that we shall provide by law, no matter what the case may be, that he shall not be tried again; that he shall go acquit.

Mr. RAYNER. That when he has been acquitted he shall stay acquitted. I do not believe in a man being acquitted and afterwards being convicted. If acquitted once he ought to be acquitted forever.

Mr. SPOONER. The Senator is arguing for a much larger rule than the committee has reported, and a larger innovation.

Mr. President, the case of The United States *v.* Ball is a very interesting case, as I was saying, in overruling the English doctrine. I will state it again for the moment, for it goes to this question of jeopardy. It would not cover all such cases. It was a case where there were two brothers Ball, and another man, who were indicted for murder. One was acquitted. The other two were convicted. They appealed to the Supreme Court of the United States, and the Supreme Court reversed the conviction upon the ground that the indictment was bad. A new indictment was found, which included the man who was acquitted. He plead former acquittal, and the court below overruled his plea. The Supreme Court sustained it, and said that he could not be again put upon trial.

Mr. RAYNER. I know the case.

Mr. SPOONER. The court said:

> As to the defendant, who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final and could not be reviewed, on error or otherwise, without putting him twice in jeopardy and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense. (U. S. *v.* Ball, 163 U. S., 671.)

That is where the indictment was bad.

Mr. President, I do not intend to take further time. The matter has been thoroughly argued. I am content to leave it, under the bill, if it shall become a law, to the Supreme Court of the United States. It is their function to determine what

is jeopardy. It is their function to protect the citizens of the United States against any invasion of the constitutional guaranty as to double jeopardy. I think we can rely upon the court to protect as far as the Constitution requires it all defendants, without supplementing the Constitution by the Senator's amendment to this bill.

Mr. CLARKE of Arkansas obtained the floor.

Mr. CULLOM. Mr. President——

The PRESIDING OFFICER (Mr. KEAN in the chair). Does the Senator from Arkansas yield to the Senator from Illinois?

Mr. CLARKE of Arkansas. Certainly.

Mr. CULLOM. If the Senator from Arkansas would prefer to go on to-morrow, I desire to move an executive session.

Mr. CLARKE of Arkansas. Very well.

Mr. NELSON. Before the motion is put, I should like to make a statement. I desire to state that I shall move to take up this bill for consideration at the earliest practicable moment to-morrow morning after the routine morning business, not to interfere, however, with appropriation bills.

Mr. LODGE. I gave notice yesterday that I would call up the Philippine bank bill. Of course, if the pending bill is not to be disposed of, there will be no chance to have anything else done. I feel bound now to give notice that I shall try to call up the Philippine bank bill and dispose of it at the earliest possible moment.

Mr. CULLOM. I will state in addition to that that there is a very important appropriation bill ready to be taken up to-morrow.

Mr. HEYBURN. I move that all the amendments to the pending bill submitted to-day be printed.

The motion was agreed to.

ELIZABETH H. RICE.

Mr. LODGE. I ask that the Senate proceed to the consideration of the bill (S. 6731) granting a pension to Elizabeth Huntington Rice.

There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the bill, which had been reported from the Committee on Pensions with an amendment, to strike out all after the enacting clause and insert:

That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension roll, subject to the provisions and limitations of the pension laws, the name of Elizabeth H. Rice, widow of Edmund Rice, late colonel Nineteenth Regiment United States Infantry, and brigadier-general, United States Army, retired, and pay her a pension at the rate of $50 per month in lieu of that she is now receiving.

The amendment was agreed to.

The bill was reported to the Senate as amended, and the amendment was concurred in.

The bill was ordered to be engrossed for a third reading, read the third time, and passed.

The title was amended so as to read: "A bill granting an increase of pension to Elizabeth H. Rice."

EXECUTIVE SESSION.

Mr. CULLOM. I move that the Senate proceed to the consideration of executive business.

The motion was agreed to; and the Senate proceeded to the consideration of executive business. After ten minutes spent in executive session the doors were reopened, and (at 5 o'clock p. m.) the Senate adjourned until to-morrow, Wednesday, February 13, 1907, at 12 o'clock meridian.

NOMINATIONS.

Executive nominations received by the Senate February 12, 1907.

SURVEYOR-GENERAL.

Matthew Kyle, of Nevada, to be surveyor-general of Nevada, to take effect February 26, 1907, at the expiration of his term. (Reappointment.)

REGISTER OF LAND OFFICE.

John W. Price, of Casper, Wyo., to be register of the land office at Douglas, Wyo., vice Albert D. Chamberlin, resigned.

RECEIVER OF PUBLIC MONEYS.

Samuel Slaymaker, of Douglas, Wyo., to be receiver of public moneys at Douglas, Wyo., vice Merris C. Barrow, removed.

POSTMASTER.

SOUTH DAKOTA.

Willis H. Bonham to be postmaster at Deadwood, in the county of Lawrence and State of South Dakota, in place of Willis H. Bonham. Incumbent's commission expired December 20, 1906.

CONFIRMATIONS.

Executive nominations confirmed by the Senate February 12, 1907.

PROMOTIONS IN THE NAVY.

Passed Asst. Surg. Henry E. Odell to be a surgeon in the Navy from the 6th day of September, 1906.

Asst. Surg. Robert H. Michels to be a passed assistant surgeon in the Navy from the 8th day of October, 1906, upon the completion of three years' service in his present grade.

RECEIVER OF PUBLIC MONEYS.

Samuel Slaymaker to be receiver of public moneys at Douglas, Wyo.

UNITED STATES ATTORNEY.

Charles W. Hoitt, of New Hampshire, to be United States attorney for the district of New Hampshire.

REGISTER OF THE LAND OFFICE.

J. W. Price to be register of the land office at Douglas, Wyo.

POSTMASTERS.

CALIFORNIA.

Thomas E. Byrnes to be postmaster at San Mateo, in the county of San Mateo and State of California.

Felix L. Grauss to be postmaster at Calistoga, in the county of Napa and State of California.

Eri Huggins to be postmaster at Fort Bragg, in the county of Mendocino and State of California.

M. M. Scoon to be postmaster at Rocklin, in the county of Placer and State of California.

Renaldo E. Taylor to be postmaster at Gridley, in the county of Butte and State of California.

William L. Williams to be postmaster at Madera, in the county of Madera and State of California.

ILLINOIS.

Edward E. Gott to be postmaster at Norris City, in the county of White and State of Illinois.

Clark J. McManis to be postmaster at Princeton, in the county of Bureau and State of Illinois.

Frank G. Robinson to be postmaster at El Paso, in the county of Woodford and State of Illinois.

Otis E. Stumpf to be postmaster at Findlay, in the county of Shelby and State of Illinois.

Thomas H. White to be postmaster at National Stock Yards, in the county of St. Clair and State of Illinois.

INDIANA.

Joseph C. Andrew to be postmaster at Redkey, in the county of Jay and State of Indiana.

Cash M. Graham to be postmaster at South Whitley, in the county of Whitley and State of Indiana.

KENTUCKY.

Marcus L. Kincheloe to be postmaster at Hardinsburg, in the county of Breckinridge and State of Kentucky.

MARYLAND.

George C. Riggin to be postmaster at Crisfield, in the county of Somerset and State of Maryland.

MICHIGAN.

Earl B. Hammond to be postmaster at Vermontville, in the county of Eaton and State of Michigan.

Newton E. Tower to be postmaster at Union City, in the county of Branch and State of Michigan.

MINNESOTA.

Andrew J. Davis to be postmaster at South St. Paul, in the county of Dakota and State of Minnesota.

MISSOURI.

Troy L. Crane to be postmaster at Lees Summit, in the county of Jackson and State of Missouri.

Jerome W. Jones to be postmaster at Brookfield, in the county of Linn and State of Missouri.

NEW YORK.

John R. Costello to be postmaster at Chittenango, in the county of Madison and State of New York.

George H. Keeler to be postmaster at Hammondsport, in the county of Steuben and State of New York.

Fred O'Neil to be postmaster at Malone, in the county of Franklin and State of New York.

William J. H. Parker to be postmaster at Moravia, in the county of Cayuga and State of New York.

John O. Thibault to be postmaster at Clayton, in the county of Jefferson and State of New York.

James A. Wilson to be postmaster at Sacket Harbor, in the county of Jefferson and State of New York.

OHIO.

J. A. Donnelly to be postmaster at New Lexington, in the county of Perry and State of Ohio.

James A. Downs to be postmaster at Scio, in the county of Harrison and State of Ohio.

Homer S. Kent to be postmaster at Chagrin Falls, in the county of Cuyahoga and State of Ohio.

Charles T. La Cost to be postmaster at Bryan, in the county of Williams and State of Ohio.

WISCONSIN.

George H. Dodge to be postmaster at Arcadia, in the county of Trempealeau and State of Wisconsin.

Frank H. Marshall to be postmaster at Kilbourn, in the county of Columbia and State of Wisconsin.

Albert H. Tarnutzer to be postmaster at Prairie du Sac, in the county of Sauk and State of Wisconsin.

Earl S. Welch to be postmaster at Eau Claire, in the county of Eau Claire and State of Wisconsin.

HOUSE OF REPRESENTATIVES.

TUESDAY, *February 12, 1907.*

The House met at 12 o'clock noon.

The Chaplain, Rev. HENRY N. COUDEN, D. D., offered the following prayer:

We thank Thee, our Father in heaven, that our Republic holds in grateful memory all who have contributed to its life and perpetuity, especially that host of illustrious men "who have breathed their spirits into its institutions" and made it great and glorious; that to-day the hearts of eighty millions will beat with patriotic pride and take the name of Abraham Lincoln upon reverent lips and vie with each other in telling the story of his marvelous life and achievements. Out of obscurity Thou didst lead him to be the savior of his people. "With malice toward none and charity for all" he died a martyr to liberty and freedom. God grant that we may keep his memory sacred to our hearts and honor ourselves by following his example in American citizenship. In the spirit of the Lord Jesus Christ, Amen.

The Journal of the proceedings of yesterday was read and approved.

JAPANESE SCHOOLS.

Mr. GILBERT. Mr. Speaker, I ask unanimous consent to extend in the RECORD some remarks upon the Japanese schools.

The SPEAKER. The gentleman from Kentucky asks unanimous consent to extend remarks in the RECORD upon the subject indicated. Is there objection?

There was no objection.

UNITED STATES JUDGE NORTHERN JUDICIAL DISTRICT OF ALABAMA.

Mr. CLAYTON. Mr. Speaker, I ask unanimous consent for the present consideration of the bill (H. R. 24887) providing for a United States judge for the northern district of Alabama.

The Clerk read the bill, as follows:

Be it enacted, etc., That the President of the United States, by and with the advice and consent of the Senate, shall appoint a district judge for the northern judicial district of Alabama, who shall possess and exercise all the powers conferred by existing law upon the judges of the district courts of the United States, and who shall possess the same powers and perform the same duties within the said northern judicial district of Alabama as are now possessed by and performed by the district judge of the United States in any of the judicial districts established by law, and he shall receive the same compensation now or hereafter prescribed by law in respect to other district judges of the United States: *And provided,* That the judge appointed under this act shall reside at Birmingham, in said district.

Mr. CLAYTON. Mr. Speaker, I offer the following amendment.

The Clerk read as follows:

On page 2, line 2, after the words "*provided,* That," insert the words "after appointment."

The amendment was agreed to.

The bill was ordered to be engrossed and read a third time, was read the third time, and passed.

Mr. CLAYTON. I move that the title be amended by inserting, after the word "northern," the word "judicial."

The amendment was agreed to.

On motion of Mr. CLAYTON, a motion to reconsider the vote by which the bill was passed was laid on the table.

Mr. CLAYTON. Mr. Speaker, I thank the House for the action just taken. This bill presents a most meritorious case. The facts are stated in the report, which I prepared and presented. I here insert it in the RECORD. It is as follows:

The Committee on the Judiciary, to whom was referred the bill (H. R. 24887) providing for a United States judge for the northern judicial district of Alabama, having had the same under consideration, report it back with the recommendation that the bill do pass.

At present there is only one judge for both the northern and middle judicial districts of Alabama, and he resides at Montgomery, in the middle district.

It is impossible for one judge to do the work of both districts.

The terms of the circuit and district courts in the northern district of Alabama are held as follows:

Huntsville: April and October; duration of term, two months.
Anniston: May and November; duration of term, two months.
Tuscaloosa: January and June; duration of term, three weeks.
Birmingham: March and September; duration of term, six months.
Total, about eleven months.

In the middle district circuit and district courts are held at Montgomery in accordance with the special statute in May and December, and the session of the district court is also held there the first Monday in each month. Besides, special terms of the courts have been held there at different intervals from time to time. The minimum requirement for holding the district and circuit courts by the present judge in the northern and middle judicial districts aggregates about thirteen months in each year. In the southern district, where there is a judge residing at Mobile, court is in session about five months in each year. In addition to the terms of the court there the judge has much work to do in chambers at all times, as there is a very considerable admiralty business done at that port. Besides, this judge holds court twice a year at Selma, Ala., in his district, and is frequently called to serve on the circuit court of appeals at New Orleans. All his time is now occupied.

Circuit Judge Shelby has held the circuit court at Huntsville since May, 1905. Judge Boarman, of Louisiana, held the district court there last year. Judge Toulmin, of the southern district, has held all the terms of court at Anniston. The judge of the northern and middle district, Judge Jones, held the court at Tuscaloosa in May, 1906. The business at Huntsville, Tuscaloosa, and Anniston is fairly well up to date.

For many years district judges from neighboring States have been called in to assist in the northern district of Alabama, but such assistance as these judges have been able to give has not been sufficient to dispose of the business or to relieve the congested condition of the dockets.

At Birmingham the business of the United States courts is about three years behind. There are about 300 civil cases on the docket there. It takes nearly three years to get a civil case to trial at Birmingham. That city is the center of large coal-mining, iron-mining, and manufacturing industries. The commerce and tonnage there is greater than at any other point in the entire South. There are fourteen railroads and two more are being built. Many civil suits are brought there against foreign corporations, and these suits are, at the instance of the attorneys for these corporations, generally removed to the Federal courts.

At the last session of Congress an act was passed requiring the court at Birmingham to be held six months in each year. It has been impossible for the present judge to strictly comply with this law, and it is obvious that this act has not afforded the desired relief. During the year ending June 30, 1906, circuit and district courts were held at the different places in the northern district as follows:

	Days.	
Huntsville:		
By Circuit Judge Shelby	21	
By Judge Boarman, of Louisiana	55	
		76
Anniston: Judge Toulmin, of southern district of Alabama		25
Birmingham:		
Judge Jones	65	
Judge Toulmin	27	
		92
Tuscaloosa: Judge Jones		7
Total		200

It is understood, of course, that this shows only a fraction of the work performed by the present judge. It is an ascertained fact that besides holding courts at Montgomery he holds court for the northern district at chambers in Montgomery many days each month. Indeed, when he is at Montgomery he transacts more or less business for the northern district—that is, the Birmingham district—every day, such as orders in bankruptcy cases, hearing and deciding cases in equity, etc. On June 30, 1906, there were pending in the northern district of Alabama 504 criminal and civil cases, all of them said to be live cases. Besides, there were pending there at the same time 349 bankruptcy cases. At the same time there were pending 230 criminal and civil cases at Montgomery, most of them live cases. Besides, there were pending at Montgomery at the same time 302 bankruptcy cases.

The Department of Justice recently made a very thorough examination of the conditions in Alabama and elsewhere in nine cases in which bills were introduced into Congress for additional judges. This investigation showed the necessity for four more district judges, one of them for the northern district of Alabama.

For several years past the condition of the business in the United States courts in the northern district of Alabama has presented an urgent case for relief. Several bills have been proposed. I introduced one for an additional judge of the middle and northern districts. That bill did not meet with the favor of the committee nor with the approval of the Department of Justice. Besides, one of my colleagues has always opposed it, upon the ground that a separate judge for the northern judicial district of Alabama was what was needed—that district now having no separate judge—and not an additional judge for the two districts.

He has informed me that he would object to the consideration of any bill except one in present form—that is to say, the bill which has just been read at the Clerk's desk, and which I also introduced. Of course the objection of any one Member would have defeated the passage of this bill. Whatever may have been my preference as to the details of the matter, I did not succeed in getting the approval of the committee or the Department of Justice, or the cooperation of all of my colleagues from Alabama, for any measure except the bill which has just passed.

During the present Congress the Department of Justice has